

Recorded in Deschutes County
Nancy Blankenship, County Clerk
Commissioners' Journal

CJ2021-32

02/02/2021 11:23:47 AM



BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Ordinance Amending Deschutes County Code Title 23, the Deschutes County Comprehensive Plan, to Change the Comprehensive Plan Map Designation for Certain Property From Agriculture to Rural Industrial, and Amending Deschutes County Code Title 18, the Deschutes County Zoning Map, to Change the Zone Designation for Certain Property From Exclusive Farm Use to Rural Industrial.

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ORDINANCE NO. 2021-002

WHEREAS, Anthony Aceti, applied for changes to both the Deschutes County Comprehensive Plan Map (247-20-000438-PA) and the Deschutes County Zoning Map (247-20-000439-ZC), to change comprehensive plan designation of the subject property from an Agricultural (AG) to Rural Industrial (RI) and a corresponding zone change from Exclusive Farm Use (EFU) to Rural Industrial (RI); and

WHEREAS, after notice was given in accordance with applicable law, a public hearing was held on September 1, 2020, before the Deschutes County Hearings Officer and, on October 8, 2020, the Hearings Officer recommended approval of both the Comprehensive Plan Map change and Zoning Map change; and

WHEREAS, after notice was given in accordance with applicable law, a *de novo* public hearing was held on December 2, 2020, before the Board of County Commissioners (Board); and

WHEREAS, the Board, after review conducted in accordance with applicable law, both approved the plan amendment to change the Comprehensive Plan Map designation from AG to RI, and approved the Zoning Map amendment to change from EFU to RI via oral motion and directed staff to prepare this ordinance consistent with that motion; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, ORDAINS as follows:

Section 1. AMENDMENT. DCC Title 23, Deschutes County Comprehensive Plan Map, is amended to change the plan designation for certain property described in Exhibit "A" and depicted on the map set forth as Exhibit "B", with both exhibits attached and incorporated by reference herein, from AG to RI.

Section 2. AMENDMENT. DCC Title 18, Zoning Map, is amended to change the zone designation from EFU to RI for certain property described in Exhibit "A" and depicted on the map set forth as Exhibit "C."

Section 3. AMENDMENT. DCC Section 23.01.010, Introduction, is amended to read as described in Exhibit "D" attached and incorporated by reference herein, with new language underlined.

Section 4. AMENDMENT. Deschutes County Comprehensive Plan Section 5.12, Legislative History, is amended to read as described in Exhibit "E" attached and incorporated by reference herein, with new language underlined.

Section 5. FINDINGS. The Board adopts as its findings in support of this Ordinance the Decision of the Hearings Officer as set forth in Exhibit "F" and incorporated by reference herein.

Dated this 27th of JANUARY, 2021

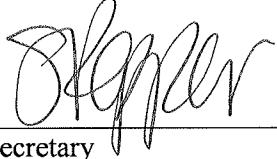
BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON


ANTHONY DEBONE, Chair


PHIL CHANG, Vice Chair


PATTI ADAIR, Commissioner

ATTEST:


Recording Secretary

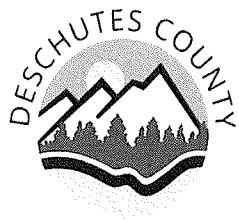
Date of 1st Reading: 13 day of January, 2021.

Date of 2nd Reading: 27 day of JANUARY, 2021.

Record of Adoption Vote:

Commissioner	Yes	No	Abstained	Excused
Anthony DeBone	X	—	—	—
Phil Chang	—	—	X	—
Patti Adair	X	—	—	—

Effective date: 27 day of April, 2021.



Deschutes County Board of Commissioners
1300 NW Wall St, Bend, OR 97703
(541) 388-6570 – Fax (541) 385-3202 – <https://www.deschutes.org/>

AGENDA REQUEST & STAFF REPORT

For Board of Commissioners BOCC Wednesday Meeting of January 27, 2021

DATE: January 13, 2021

FROM: Matthew Martin, Community Development, 541-330-4620

TITLE OF AGENDA ITEM:

SECOND READING: Consideration of Board Signature of Ordinance No. 2021-002 - Plan Amendment and Zone Change from Agriculture/Exclusive Farm Use to Rural Industrial (Aceti)

BACKGROUND AND POLICY IMPLICATIONS:

The applicant, Anthony Aceti, proposed a plan amendment and zone change for the subject 21.54-acre property at 21235 Tumalo Place, Bend (tax maps and lots 16-12-26C, 201 / 16-12-27D, 104) located at the intersections of Tumalo Road/Tumalo Place/Highway 97, or what is commonly referred to as Deschutes Junction. Specifically, the proposal includes a comprehensive plan amendment to re-designate the subject property from Agriculture to Rural Industrial and a corresponding zone change from Exclusive Farm Use - Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (RI).

On September 1, 2020, the Deschutes County Hearings Officer conducted a public hearing to receive testimony. On October 8, 2020, the Hearings Officer issued a decision recommending approval of the proposed plan amendment and zone change.

On December 2, 2020, the Board of Commissioners conducted a public hearing to receive testimony. On December 30, 2020, the Board of Commissioners approved the request via oral motion and directed staff to prepare an ordinance consistent with that motion.

On January 13, 2021, the Board of Commissioners conducted first reading of Ordinance No. 2021-002.

FISCAL IMPLICATIONS: None.

ATTENDANCE: Matthew Martin, Associate Planner

EXHIBIT A

LEGAL DESCRIPTIONS TAX LOTS 16-12-26-C-00201 & 16-12-27-D-00104

A parcel of land located in the Southwest one-quarter of Section 26 and the Southeast one-quarter of Section 27, Township 16 South, Range 12 East of the Willamette Meridian, Deschutes County, Oregon, more fully described as follows:

TAX LOTS 16-12-26-C-00201:

Commencing at a brass disk at the 1/4 corner between said Sections 26 and 27; thence along the east-west centerline of said Section 27, North 89°49'46" West 20.00 feet; thence leaving said east-west centerline, South 00°03'15" East, parallel to and 20 feet westerly of the line common to said Sections 26 and 27, 40.35 feet to a point on the southerly line of the 15.00 foot dedication to the southerly 30.00 foot right-of-way of Tumalo Road per Deed No. 98-29504, and the **Point of Beginning** for this description; thence along said 15-foot dedication line, 67.90 feet along the arc of a 12818.89 foot radius curve right (the long chord of which bears South 89°35'07" East 67.90 feet); thence South 89°26'01" East 997.75 feet to the westerly right-of-way of the Dalles-California Highway per Deed recorded March 22, 1991, in Book 231, Page 81, Deschutes County Records; thence leaving said 15-foot dedication line and along said westerly right-of-way, South 37°03'52" East 23.10 feet, said point being 85.00 feet from the centerline of said Dalles-California Highway; thence continuing along said 85-foot right-of-way line, South 26°22'14" West 1419.88 feet to a point on the south line of the property described in Deed No. 97-45542; thence leaving said 85-foot right-of-way line and along said south line, South 89°56'45" West 447.62 feet to the southwest corner of said 97-45542 property, said point lying 20.00 feet westerly of the line common to Sections 26 and 27; thence leaving said south line, North 00°03'15" West 1301.34 feet to the point of beginning;

EXCEPTING THEREFROM: the new alignment of Tumalo Road per Deed No. 98-32048, further modified for turn lanes per Deed No. 2001-22023, fully described as follows:

Commencing at a brass disk at the 1/4 corner between said Sections 26 and 27; thence along the east-west centerline of said Section 27, North 89°49'46" West 20.00 feet; thence leaving said east-west centerline, South 00°03'15" East, parallel to and 20 feet westerly of the line common to said Sections 26 and 27, 357.34 feet to the northerly right-of-way of the new road alignment, and the **Point of Beginning** for this description; thence leaving said parallel line and along the new right-of-way line, South 59°39'01" East 50.46 feet; thence South 62°39'40" East 442.65 feet; thence South 63°56'22" East 250.70 feet; thence South 59°39'01" East 95.51 feet to the westerly 85 foot right-of-way line of the Dalles-California Highway; thence leaving said new road right-of-way and along said westerly 85 foot right-of-way line, South 26°22'14" West 170.41 feet to the southerly right-of-way line of the new road; thence leaving said westerly 85 foot right-of-way line and along said southerly right-of-way line, North 59°39'01" West 107.34 feet; thence North 55°21'40" West 250.70 feet; thence North 56°38'22" West 442.65 feet, said point lying 20.00 feet westerly of the line common to Sections 26 and 27; thence North 00°03'15" East 99.71 feet to the point of beginning.

Net area for this property is 20.46 acres.

October 14, 2015

Prepared by Baxter Land Surveying, Inc.
P.O. Box 7022, Bend, OR 97708 (541) 382-1962

2015186-Desc.doc

(D)

EXHIBIT A

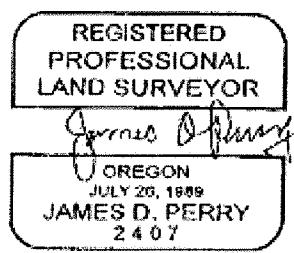
TAX LOTS 16-12-27-D-00104:

That portion of Deed No. 97-40139 described as "Parcel 3," further modified by the excepting of Tract 1 and Tract 2 of Deed No. 98-32049, and more fully described as follows:

Beginning at the Point of Beginning for the previous description of TAX LOT 16-12-27-C- 00201, said point being on the southerly 45 foot right-of-way of Tumalo Road and lying 20.00 feet westerly of the line common to Sections 26 and 27; thence along said 20 foot westerly line, North 00°03'15" West 5.00 feet to a point on a 40.00 foot right-of-way of Tumalo Road, per said 98-32049 Deed; thence leaving said 20 foot line, 31.74 feet along the arc of a 12823.89 foot radius curve left (the long chord of which bears North 89°48'29" West 31.74 feet); thence North 89°52'44" West 26.42 feet; thence 219.07 feet along the arc of a 210.00 foot radius curve left (the long chord of which bears South 60°14'07"West 209.27 feet); thence South 30°20'59" West 40.03 feet; thence 47.12 feet along the arc of a 30.00 foot radius curve left (the long chord of which bears South 14°39'01" East 42.43 feet); thence South 59°39'01" East 145.00 feet; thence South 60°51'23" East 142.53 feet to a point lying 20.00 feet westerly of the line common to said Sections 26 and 27; thence North 00°03'15" West 317.00 feet to the point of beginning for this description;

Contains 1.30 acres.

Note: All corners are marked with monuments per recorded survey No. CS14491 by Michael Berry.



RENEWS 12-31-2016

October 14, 2015

Prepared by Baxter Land Surveying, Inc.
P.O. Box 7022, Bend, OR 97708 (541) 382-1962

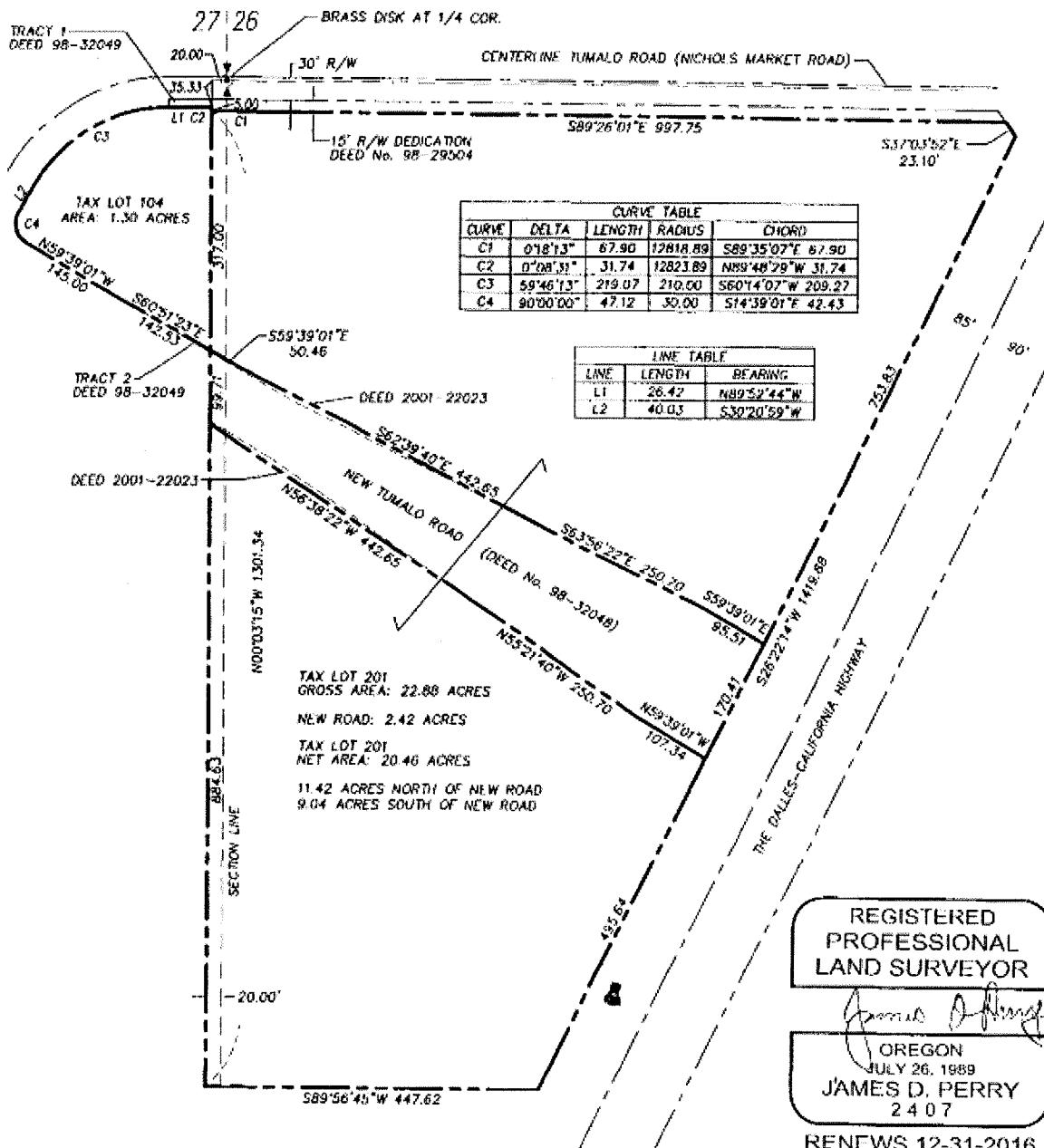
2015186-Desc.doc

(2)

EXHIBIT A

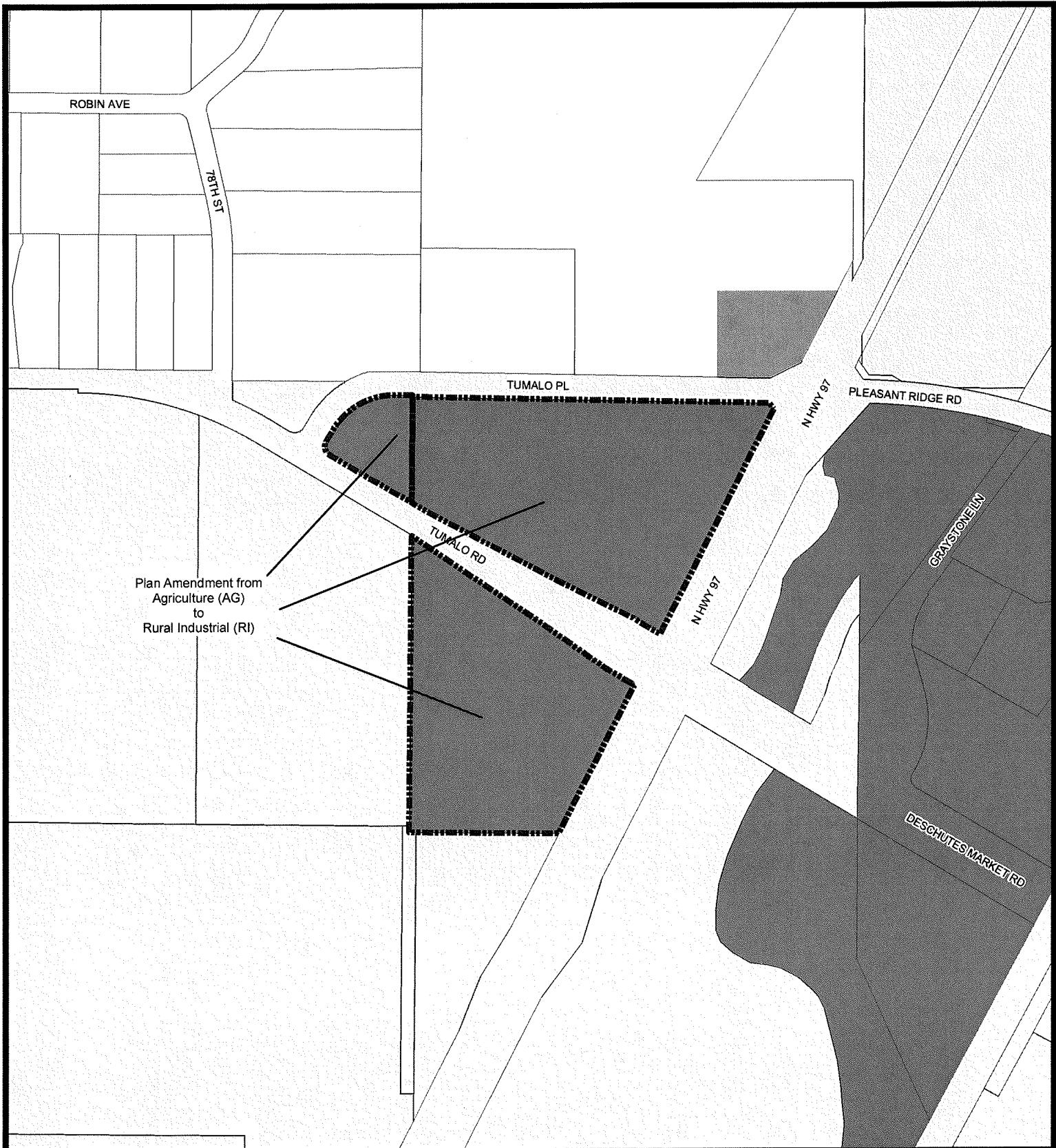
**EXHIBIT MAP
TAX LOTS 16-12-26-C-00201
AND 16-12-27-D-00104**

*Located in the SW1/4 Sec. 26 and the SE1/4 Sec. 27,
T.16S., R.12E., W.M.,
DESCHUTES COUNTY, OREGON*



PREPARED BY BAXTER LAND SURVEYING, INC. P.O. BOX 7022 BEND, OR 97708
20370 EMPIRE AVE. SUITE C-3, BEND, OR 97701 (541) 382-1962

(3)



Legend

Subject Properties

Comprehensive Plan

AG - Agriculture

RC - Rural Commercial

RI - Rural Industrial

RREA - Rural Residential Exception Area

PROPOSED PLAN AMENDMENT MAP

Exhibit "B"
to Ordinance 2021-002



0 312.5 625 Feet

November 11, 2020

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Ruth DeBone

Tony DeBone, Chair

May Chang

Phil Chang, Vice Chair

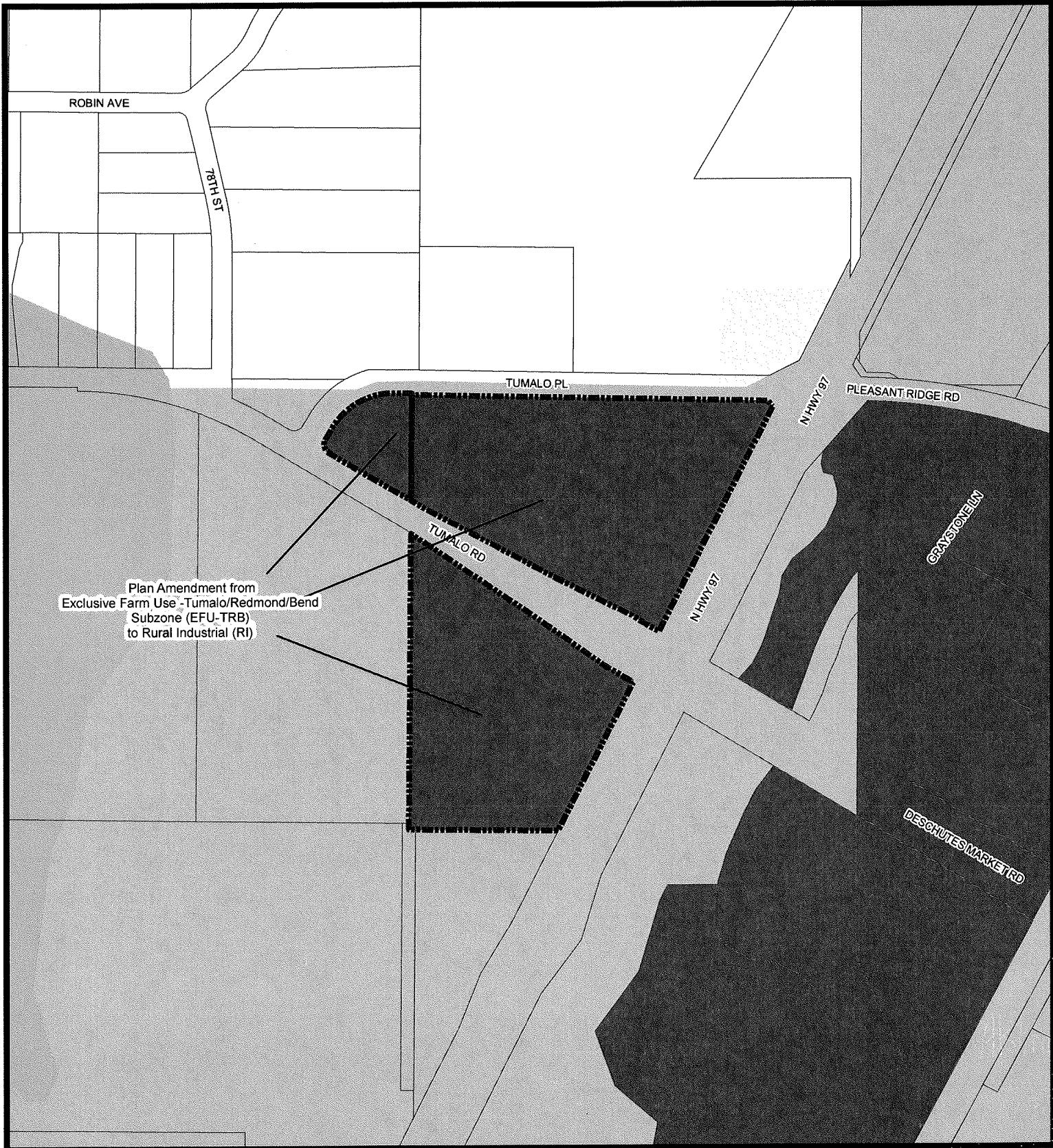
Patti Adair

Patti Adair, Commissioner

ATTEST: Recording Secretary

Dated this 27th day of April 2021

Effective Date: April 27th 2021



Legend

Subject Properties

Zoning

EFU - TUMALO/REDMOND/BEND SUBZONE

FLOOD PLAIN

MULTIPLE USE AGRICULTURAL

RURAL COMMERCIAL

RURAL INDUSTRIAL

PROPOSED ZONING MAP

Exhibit "C"
to Ordinance 2021-002



0 312.5 625 Feet

November 11, 2020

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Tony DeBone, Chair
 Phil Chang, Vice Chair

Patti Adair, Commissioner

ATTEST: Recording Secretary

Dated this 27th day of January 2021
Effective Date: April 1, 2021

EXHIBIT D

Chapter 23.01 COMPREHENSIVE PLAN

Chapter 23.01 COMPREHENSIVE PLAN

23.01.010. Introduction.

- A. The Deschutes County Comprehensive Plan, adopted by the Board in Ordinance 2011-003 and found on the Deschutes County Community Development Department website, is incorporated by reference herein.
- B. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2011-027, are incorporated by reference herein.
- C. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-005, are incorporated by reference herein.
- D. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-012, are incorporated by reference herein.
- E. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2012-016, are incorporated by reference herein.
- F. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-002, are incorporated by reference herein.
- G. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-009, are incorporated by reference herein.
- H. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-012, are incorporated by reference herein.
- I. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2013-007, are incorporated by reference herein.
- J. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-005, are incorporated by reference herein.
- K. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-006, are incorporated by reference herein.
- L. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-012, are incorporated by reference herein.
- M. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-021, are incorporated by reference herein.
- N. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2014-027, are incorporated by reference herein.
- O. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-021, are incorporated by reference herein.
- P. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-029, are incorporated by reference herein.
- Q. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-018, are incorporated by reference herein.
- R. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2015-010, are incorporated by reference herein.
- S. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-001, are incorporated by reference herein.
- T. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-022, are incorporated by reference herein.
- U. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-005, are incorporated by reference herein.

EXHIBIT D

- V. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-027, are incorporated by reference herein.
- W. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2016-029, are incorporated by reference herein.
- X. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2017-007, are incorporated by reference herein.
- Y. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-002, are incorporated by reference herein.
- Z. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-006, are incorporated by reference herein.
- AA. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-011, are incorporated by reference herein.
- BB. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-005, are incorporated by reference herein.
- CC. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2018-008, are incorporated by reference herein.
- DD. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-002, are incorporated by reference herein.
- EE. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-001, are incorporated by reference herein.
- FF. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-003, are incorporated by reference herein.
- GG. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-004, are incorporated by reference herein.
- HH. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-011, are incorporated by reference herein.
- II. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-006, are incorporated by reference herein.
- JJ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-016, are incorporated by reference herein.
- KK. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2019-019, are incorporated by reference herein.
- LL. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-001, are incorporated by reference herein.
- MM. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-002, are incorporated by reference herein.
- NN. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-003, are incorporated by reference herein.
- OO. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-008, are incorporated by reference herein.
- PP. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-003, are incorporated by reference herein.
- QQ. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-007, are incorporated by reference herein.
- RR. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-006, are incorporated by reference herein.
- SS. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-009, are incorporated by reference herein.

EXHIBIT D

TT. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2020-013, are incorporated by reference herein.

UU. The Deschutes County Comprehensive Plan amendments, adopted by the Board in Ordinance 2021-002, are incorporated by reference herein.

(Ord. 2021-002§3, 2021; Ord. 2020-013§1, 2020; Ord. 2020-009§1, 2020; Ord. 2020-006§1, 2020; Ord. 2020-007§1, 2020; Ord. 2020-008§1, 2020; Ord. 2020-003 §1, 2020; Ord. 2020-002 §1, 2020; Ord. 2020-001 §26, 2020; Ord. 2019-019 §2, 2019; Ord. 2019-016 §3, 2019; Ord. 2019-006 § 1, 2019; Ord. 2019-011 § 1, 2019; Ord. 2019-004 §1, 2019; Ord. 2019-003 §1, 2019; Ord. 2019-001 §1, 2019; Ord. 2019-002 §1, 2019; Ord. 2018-008 §1, 2018; Ord. 2018-005 §2, 2018; Ord. 2018-011 §1, 2018; Ord. 2018-006 §1, 2018; Ord. 2018-002 §1, 2018; Ord. 2017-007 §1, 2017; Ord. 2016-029 §1, 2016; Ord. 2016-027 §1, 2016; Ord. 2016-005 §1, 2016; Ord. 2016-022 §1, 2016; Ord. 2016-001 §1, 2016; Ord. 2015-010 §1, 2015; Ord. 2015-018 § 1, 2015; Ord. 2015-029 § 1, 2015; Ord. 2015-021 § 1, 2015; Ord. 2014-027 § 1, 2014; Ord. 2014-021 §1, 2014; Ord. 2014-12 §1, 2014; Ord. 2014-006 §2, 2014; Ord. 2014-005 §2, 2014; Ord. 2013-012 §2, 2013; Ord. 2013-009 §2, 2013; Ord. 2013-007 §1, 2013; Ord. 2013-002 §1, 2013; Ord. 2013-001 §1, 2013; Ord. 2012-016 §1, 2012; Ord. 2012-013 §1, 2012; Ord. 2012-005 §1, 2012; Ord. 2011-027 §1 through 12, 2011; Ord. 2011-017 repealed; Ord.2011-003 §3, 2011)

Click here to be directed to the Comprehensive Plan (<http://www.deschutes.org/compplan>)

Section 5.12 Legislative History

Background

This section contains the legislative history of this Comprehensive Plan.

Table 5.12.1 Comprehensive Plan Ordinance History

Ordinance	Date Adopted/ Effective	Chapter/Section	Amendment
2011-003	8-10-11/11-9-11	All, except Transportation, Tumalo and Terrebonne Community Plans, Deschutes Junction, Destination Resorts and ordinances adopted in 2011	Comprehensive Plan update
2011-027	10-31-11/11-9-11	2.5, 2.6, 3.4, 3.10, 3.5, 4.6, 5.3, 5.8, 5.11, 23.40A, 23.40B, 23.40.065, 23.01.010	Housekeeping amendments to ensure a smooth transition to the updated Plan
2012-005	8-20-12/11-19-12	23.60, 23.64 (repealed), 3.7 (revised), Appendix C (added)	Updated Transportation System Plan
2012-012	8-20-12/8-20-12	4.1, 4.2	La Pine Urban Growth Boundary
2012-016	12-3-12/3-4-13	3.9	Housekeeping amendments to Destination Resort Chapter
2013-002	1-7-13/1-7-13	4.2	Central Oregon Regional Large-lot Employment Land Need Analysis
2013-009	2-6-13/5-8-13	1.3	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2013-012	5-8-13/8-6-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2013-007	5-29-13/8-27-13	3.10, 3.11	Newberry Country: A Plan for Southern Deschutes County

2013-016	10-21-13/10-21-13	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Sisters Urban Growth Boundary
2014-005	2-26-14/2-26-14	23.01.010	Comprehensive Plan Map Amendment, including certain property within City of Bend Urban Growth Boundary
2014-012	4-2-14/7-1-14	3.10, 3.11	Housekeeping amendments to Title 23.
2014-021	8-27-14/11-25-14	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Sunriver Urban Unincorporated Community Forest to Sunriver Urban Unincorporated Community Utility
2014-021	8-27-14/11-25-14	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Sunriver Urban Unincorporated Community Forest to Sunriver Urban Unincorporated Community Utility
2014-027	12-15-14/3-31-15	23.01.010, 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Industrial
2015-021	11-9-15/2-22-16	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Surface Mining.
2015-029	11-23-15/11-30-15	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Tumalo Residential 5-Acre Minimum to Tumalo Industrial
2015-018	12-9-15/3-27-16	23.01.010, 2.2, 4.3	Housekeeping Amendments to Title 23.

2015-010	12-2-15/12-2-15	2.6	Comprehensive Plan Text and Map Amendment recognizing Greater Sage-Grouse Habitat Inventories
2016-001	12-21-15/04-5-16	23.01.010; 5.10	Comprehensive Plan Map Amendment, changing designation of certain property from, Agriculture to Rural Industrial (exception area)
2016-007	2-10-16/5-10-16	23.01.010; 5.10	Comprehensive Plan Amendment to add an exception to Statewide Planning Goal 11 to allow sewers in unincorporated lands in Southern Deschutes County
2016-005	11-28-16/2-16-17	23.01.010, 2.2, 3.3	Comprehensive Plan Amendment recognizing non-resource lands process allowed under State law to change EFU zoning
2016-022	9-28-16/11-14-16	23.01.010, 1.3, 4.2	Comprehensive plan Amendment, including certain property within City of Bend Urban Growth Boundary
2016-029	12-14-16/12/28/16	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from, Agriculture to Rural Industrial
2017-007	10-30-17/10-30-17	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2018-002	1-3-18/1-25-18	23.01, 2.6	Comprehensive Plan Amendment permitting churches in the Wildlife Area Combining Zone

2018-006	8-22-18/11-20-18	23.01.010, 5.8, 5.9	Housekeeping Amendments correcting tax lot numbers in Non-Significant Mining Mineral and Aggregate Inventory; modifying Goal 5 Inventory of Cultural and Historic Resources
2018-011	9-12-18/12-11-18	23.01.010	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2018-005	9-19-18/10-10-18	23.01.010, 2.5, Tumalo Community Plan, Newberry Country Plan	Comprehensive Plan Map Amendment, removing Flood Plain Comprehensive Plan Designation; Comprehensive Plan Amendment adding Flood Plain Combining Zone purpose statement.
2018-008	9-26-18/10-26-18	23.01.010, 3.4	Comprehensive Plan Amendment allowing for the potential of new properties to be designated as Rural Commercial or Rural Industrial
2019-002	1-2-19/4-2-19	23.01.010, 5.8	Comprehensive Plan Map Amendment changing designation of certain property from Surface Mining to Rural Residential Exception Area; Modifying Goal 5 Mineral and Aggregate Inventory; Modifying Non-Significant Mining Mineral and Aggregate Inventory
2019-001	1-16-19/4-16-19	1.3, 3.3, 4.2, 5.10, 23.01	Comprehensive Plan and Text Amendment to add a new zone to Title 19: Westside Transect Zone.

2019-003	02-12-19/03-12-19	23.01.010, 4.2	Comprehensive Plan Map Amendment changing designation of certain property from Agriculture to Redmond Urban Growth Area for the Large Lot Industrial Program
2019-004	02-12-19/03-12-19	23.01.010, 4.2	Comprehensive Plan Map Amendment changing designation of certain property from Agriculture to Redmond Urban Growth Area for the expansion of the Deschutes County Fairgrounds and relocation of Oregon Military Department National Guard Armory.
2019-011	05-01-19/05-16/19	23.01.010, 4.2	Comprehensive Plan Map Amendment to adjust the Bend Urban Growth Boundary to accommodate the refinement of the Skyline Ranch Road alignment and the refinement of the West Area Master Plan Area I boundary. The ordinance also amends the Comprehensive Plan designation of Urban Area Reserve for those lands leaving the UGB.
2019-006	03-13-19/06-11-19	23.01.010,	Comprehensive Plan Map Amendment, changing designation of certain property from Agriculture to Rural Residential Exception Area
2019-016	11-25-19/02-24-20	23.01.01, 2.5	Comprehensive Plan and Text amendments incorporating language from DLCD's 2014 Model Flood Ordinance and Establishing a purpose statement for the Flood Plain Zone.

2019-019	12-11-19/12-11-19	23.01.01, 2.5	Comprehensive Plan and Text amendments to provide procedures related to the division of certain split zoned properties containing Flood Plain zoning and involving a former or piped irrigation canal.
2020-001	12-11-19/12-11-19	23.01.01, 2.5	Comprehensive Plan and Text amendments to provide procedures related to the division of certain split zoned properties containing Flood Plain zoning and involving a former or piped irrigation canal.
2020-002	2-26-20/5-26-20	23.01.01, 4.2, 5.2	Comprehensive Plan Map Amendment to adjust the Redmond Urban Growth Boundary through an equal exchange of land to/from the Redmond UGB. The exchange property is being offered to better achieve land needs that were detailed in the 2012 SB 1544 by providing more development ready land within the Redmond UGB. The ordinance also amends the Comprehensive Plan designation of Urban Area Reserve for those lands leaving the UGB.
2020-003	02-26-20/05-26-20	23.01.01, 5.10	Comprehensive Plan Amendment with exception to Statewide Planning Goal 11 (Public Facilities and Services) to allow sewer on rural lands to serve the City of Bend Outback Water Facility.

2020-008	06-24-20/09-22-20	23.01.010, Appendix C	Comprehensive Plan Transportation System Plan Amendment to add roundabouts at US 20/Cook-O.B. Riley and US 20/Old Bend-Redmond Hwy intersections; amend Tables 5.3.T1 and 5.3.T2 and amend TSP text.
2020-007	07-29-20/10-27-20	23.01.010, 2.6	Housekeeping Amendments correcting references to two Sage Grouse ordinances.
2020-006	08-12-20/11-10-20	23.01.01, 2.11, 5.9	Comprehensive Plan and Text amendments to update the County's Resource List and Historic Preservation Ordinance to comply with the State Historic Preservation Rule.
2020-009	08-19-20/11-17-20	23.01.010, Appendix C	Comprehensive Plan Transportation System Plan Amendment to add reference to J turns on US 97 raised median between Bend and Redmond; delete language about disconnecting Vandevent Road from US 97.
2020-013	08-26-20/11/24/20	23.01.01, 5.8	Comprehensive Plan Text And Map Designation for Certain Properties from Surface Mine (SM) and Agriculture (AG) To Rural Residential Exception Area (RREA) and Remove Surface Mining Site 461 from the County's Goal 5 Inventory of Significant Mineral and Aggregate Resource Sites.
<u>2021-002</u>	<u>01-27-21/04-27-21</u>	<u>23.01.01</u>	<u>Comprehensive Plan Map Designation for Certain Property from Agriculture (AG) To Rural Industrial (RI)</u>

DECISION OF THE DESCHUTES COUNTY HEARING OFFICER**FILE NUMBERS:** 247-20-000438-PA/439-ZC**APPLICANT/
OWNER:** Anthony Aceti**REPRESENTATIVE:** Patricia A. Kliewer, MPA**SOIL SCIENTIST:** Roger Borine
Sage West, LLC**TRAFFIC
ENGINEER:** Joe Bessman, PE
Transight Consulting, LLC**PROPOSAL:** Comprehensive Plan Amendment to re-designate the subject property from Agriculture to Rural Industrial and a corresponding Zone Change to change the zoning from Exclusive Farm Use - Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (RI).**LOCATION:** 21235 Tumalo Place, Bend, OR 97703;
Tax Lot 201 on Tax Map 16-12-26C and;
Tax Lot 104 on Tax Map 16-12-27D**HEARING DATE:** September 1, 2020**HEARING START:** 6:00 pm**STAFF CONTACT:** Matthew Martin, Associate Planner
Email: matt.martin@deschutes.org; Telephone: 541-330-4620**RECORD CLOSED:** September 22, 2020**DECISION DATE:** October 7, 2020**I. STANDARDS AND APPLICABLE CRITERIA:****Title 18. The Deschutes County Zoning Ordinance.**

Chapter 18.84. Landscape Management Combining Zone (LM)
Chapter 18.100. Rural Industrial Zone (RI)
Chapter 18.136, Amendments

Title 22. Deschutes County Development Procedures Ordinance**Deschutes County Comprehensive Plan**

Chapter 2. Resource Management
Chapter 3. Rural Growth Management

Oregon Administrative Rules (OAR) Chapter 660**Oregon Revised Statutes (ORS) Chapter 215. County Planning**

II. FINDINGS OF FACT:

A. LOCATION: The subject property is located at 21235 Tumalo Place, Bend, and is further identified as Tax Lot 201 on Deschutes County Assessor's Map 16-12-26C, and Tax Lot 104 on Assessor's Map 16-12-27D. The property is located at the intersection of Highway 97 and Tumalo Road in the area commonly known as Deschutes Junction.

B. LOT OF RECORD: A September 30, 2015 Hearings Officer Decision concerning the subject property, file numbers 247-14-000456-ZC/457-PA, included a finding that Tax Lots 201 and 104, together, constitute one lot of record. The Hearings Officer incorporates that finding herein.

C. ZONING AND PLAN DESIGNATIONS: TL 201 and 104 are zoned Exclusive Farm Use-Tumalo/Redmond/Bend Subzone (EFU-TRB) and are designated Agriculture under the Deschutes County Comprehensive Plan (DCCP). The property does not have any Goal 5 resource designations. The property is located within a Landscape Management Combining (LM) Zone because of its proximity to Highway 97.

D. PROPOSAL: The Applicant requests approval of a plan amendment and zone change from Agriculture and EFU-TRB, to Rural Industrial, respectively, for the subject property constituting 21.54 acres. The Applicant has not requested an exception to Statewide Planning Goal 14, Urbanization. The application does not include a development proposal.

E. SITE DESCRIPTION: The subject property is approximately 21.54 acres in size.¹ It is located in the center of the County at Deschutes Junction in the community of Deschutes. According to page 98 of the Burden of Proof, the total developable area is 15.11 acres, after setbacks, minimum distances between buildings, landscaping and the space for parking and roads is determined. This excludes the 1 acre already used for a storage building. The three portions of the developable land are irregularly shaped and consist of 0.7 acres, 8.13 acres and 6.28 acres. TL 104 was created when the overpass was constructed and was declared remnant land. TL 104 is adjacent to TL 201 to the west, and is situated to the north of Tumalo Road.

The property is generally level, and has an existing large warehouse building and gravel parking areas on three sides of the building. There is also a loading bay on the west end of the building. The site is accessed from existing driveways off of Tumalo Place and Tumalo Road. Three 40-foot wide by 120-foot long asphaltic concrete entry roads into the subject property were constructed by the County in 1998 when the roads were realigned and the overpass was constructed. One entry road is on each side of the approach to the overpass on Tumalo Road and the third is on the north property line from Tumalo Place. Each entrance has a dedicated turn lane to make entrances from Tumalo Place and Tumalo Road safer for long hay trucks.

The majority of the land is cleared of native vegetation with existing vegetation consisting of abandoned agriculture grass remnants. Minor variation in elevation is present at the northeast corner, which rises and is vegetated with a cluster of juniper trees and native shrubs. Near the eastern boundary of the property is an irregular, rocky excavation and crevasses left from a failed effort to create an irrigation water retention pond in the northwest corner of the property. Gravel has been spread for truck back-up and turn-around for the loading docks on the west side of the storage building. The Burden of Proof

¹ Aceti purchased the 24.05-acre TL 201 in 1995. Since acquisition, deeded agreements between Aceti, the Barretts, Oregon Department of Transportation (ODOT) and Deschutes County for construction of the Deschutes Junction overpass, creation of Tumalo Place, on and off ramps from US 97 and truck turn lanes into the property, and realignment of Tumalo Road have reduced its size to 20.26 acres. ODOT deeded Tax Lot 104 to Aceti in 1998. The County is purchasing 0.05 acres of TL 104 for a roundabout at the intersection of Tumalo Place and Tumalo Road, reducing TL 104 to 1.28 acres. TL 201 is divided into two distinct, non-contiguous sections by the overpass (11.43 acres (northern portion) and 9.04 acres (southern portion)).

includes photographs of the site and states, that "[d]isturbing highway noise from truck and automobile traffic on the adjoining roads and highway is nearly constant on all parts of the site."

The Pilot Butte Irrigation Canal is located about 200 feet east of the property. The canal flows south to north and is on the east side of US 97. The canal starts at the Deschutes River at the North Dam near downtown Bend and flows 22 miles north toward the Crooked River and Smith Rock State Park.

Pages 49-50 of the Burden of Proof states, in relevant part (images not included herein with text):

The property is located at the southeastern base of Long Butte. Long Butte covers about three-square miles at Deschutes Junction. According to the USGS Tumalo Quadrangle topographic map, the crest of Long Butte is at the 3,569-foot elevation. From that high point, the butte slopes relatively steeply down 300 feet to the south toward Tumalo Place and Aceti's property. The northern edge of the subject property is the lowest point of Long Butte, at 3,261 feet.

The route for US 97 was blasted out of rock. On the eastern edge of the highway is a cut wall of rock, part of the 2.5 mile long rock spine. The rock spine runs on both sides of the highway adjacent to the subject property. The distinctive rock spine wraps around the eastern and southern sides of the property. The rock spine runs from the Swalley Canal southwest of the subject site, then angles north right below the subject property, then crosses the highway and runs on the east side of the highway along the Funny Farm.

The subject property is relatively flat with raised rock outcroppings in the northeast corner. It slopes slightly to the southwest and is highest at the northeast. The highway ramp to the overpass visually bisects the property. The subject property is rocky, with rock at the surface over 20% of the entire parcel. ...

Long Butte is covered with 711 residential lots. The northwestern corner of the subject property is adjacent to the First Addition to Whispering Pines Estates, a rural residential subdivision that predicated Oregon's Land Use Planning Program. Whispering Pines Estates was originally platted with 384 lots on April 12, 1968 on the south half of Long Butte. The subdivision runs between Tumalo Road/Tumalo Place and the crest of the butte. Since that time, there have been four additions to the original plat. Lot sizes vary from one acre to three-and-a-half acres.

The on-off ramps to southbound US 97 form the north boundary of the property. The property is bordered by US 97 on the east and Tumalo Road bisects TL 201. Tumalo Road is owned by the County and constitutes the access from US 97 to Tumalo. US 97 is a four-lane divided highway that runs north-south and is maintained by ODOT. The west half of the Deschutes Junction overpass crosses the property. The approach to the overpass on the property is approximately 800 feet long and tapers from 93 feet wide at the west end to 170 feet wide at the east end of the property. The perimeter of the property is fenced with metal fence posts and barbed wire. Some culverts divert precipitation from the roadway to the subject property. A 16x16 foot culvert/underpass tunnel was constructed during the overpass project to allow vehicles and livestock to move between the northern and southern portions of the property without crossing the overpass approach.

Page 16 of the Burden of Proof states, "Its proximity to roads and highways since the end of the 19th Century, has been the primary value of this parcel." It describes a 2014 interview with the late nephew of the homesteader, James R. Low, who acquired the then 160-acre Deschutes Ranch on speculation that the location would make it valuable someday. Mr. Low's nephew, Kenneth Lowe, stated his uncle "told him that he chose the land for its accessibility and central location next to the old primary roads, and not for agricultural productivity." As set forth in the Burden of Proof at page 17:

He was not a farmer. He thought it might be valuable for urban development one day. He welcomed as progress the Pilot Butte Canal that brought in settlers and the new The Dalles-California Highway (US 97) that crossed his land and the Bend airstrip a half mile to the west, the railroad

tracks near his eastern property line, the original Dalles-California Highway (Bend-Redmond Road today), Deschutes Market Road, Deschutes Pleasant Ridge Road, Merrill Road, and the town of Centralo/Deschutes platted and developed immediately east of his ranch.

James R. Low did not clear the rocky portion that included the subject property and his unfarmable land on the rock spine to the east of it. The homestead law required the homesteader to "improve" and cultivate a minimum of 20 acres. That is what James Low did – the minimum. ... Low owned the homestead, minus the land he sold to the State of Oregon for the right-of-way for US 97, until 1943 and he never cleared or cultivated the rocky subject parcel with sparse sagebrush and even sparser stunted juniper trees.

As the property ownership section of this application demonstrates, this property has been impacted by transportation improvements an unusual number of times, since 1933, when the State of Oregon purchased the right-of-way for the new The Dalles-California Highway (US 97) from Low, through the late 1990s when the overpass and most impactful road changes occurred with the overpass project, to the present, where Aceti is negotiating with right-of-way acquisition consultants for more right-of-way for a County roundabout that is planned for the intersection of Tumalo Road and Tumalo Place that will help with the traffic flow that is increasing as the population increases. The commuters from Redmond use the overpass and Deschutes Market Road to work and shop in southeast Bend. (See TIA).

Pages 89-94 of the Burden of Proof describe the road system that serves the property:

The subject property is uniquely surrounded by rural collector and arterial roads and highways. The traffic report demonstrates that any development that occurs on site as a result of the rezone will have a negligible effect on surrounding roads.

Airports: Two airports serve the site. They are: Bend Municipal Airport at 63132 Powell Butte Highway, located 7.55 miles and 11 minutes from the subject site, and Roberts Field, the Redmond Municipal Airport, with a 132,000 square foot terminal which serves over 36,000 passengers per month and is located 8.5 miles and 12 minutes from the site.

Railroads: The Burlington Northern Railroad is located 660 feet east of the site. It has two sets of tracks, a main north-south line and a parallel passing spur, and a loading spur at the 4-R Construction Co. property that used to serve the Cascade Pumice plant at Deschutes Junction. That spur was used to load processed pumice into the rail cars.

Roads: According to former Deschutes County Surveyor Mike Berry, there were more historic roads converging on Centralo/Deschutes Junction than in any other location in Deschutes County. In addition to the paved roads that serve the area today, the junction was crossed by many historic roads that predated the formation of Deschutes County: Huntington Wagon Road, 1867; W. T. Davenport Road, 1902; G. W. Horner Road, 1908; M. J. McGrath Road, 1912; Laidlaw and Powell Butte Grande, 1913; and L. C. Young Road, 1914.

A. Tumalo Road is a paved county, two-lane, Rural Collector with two dedicated turn refuges into the subject property. The road predates 1908 and has had several names. It was first known as part of the G. W. Horner Road that ran from Tumalo to Powell Butte. Then it was known as part of the Tumalo-Powell Butte Road. Next it was Nichols Market Road. In 1991, the BOCC changed the road name from Nichols Market Road to Tumalo Road. It was realigned to cross the Aceti land in about 1998 to become the approach to the Deschutes Junction overpass.

Tumalo Road bisects the subject site west to east. 1.75 miles to the west of the subject property, Tumalo Road intersects the north-south Bend-Redmond Road. It crosses the

Deschutes River 2.75 miles to the west and intersects US 20 at the community of Tumalo about 3 miles to the west of Aceti's property. Prior to the overpass construction in 1998, commuters and commercial users didn't have to go west on Tumalo Place and then east on Tumalo Road to connect to Deschutes Market Road. They made a left turn off US 97. A Hancock Gas Station, an auto repair business, a café, a store and other businesses were at the northwest corner of the intersection of US 97 and Nichols Market Road, beginning as early as 1915.

Since 1998, traffic on Tumalo Road has increased dramatically. According to Deschutes County Road Department, the following daily trip counts were made at Tumalo Road:

West Bound 2005 - 1564 vehicles

2010 - 1584 vehicles

East Bound 2005 - 1580 vehicles

2010 - 3245 vehicles

The reason the east bound traffic increased is not due to a significant increase of population on Long Butte, but rather from the fact that Pleasant Ridge Road was closed in 2010 due to safety concerns. 4,000 vehicles per day were using Pleasant Ridge Road as a cut through to avoid the Deschutes Junction overpass. They can no longer use Pleasant Ridge Road.

Drivers were diverted from Pleasant Ridge Road when it was barricaded at US 97. Commuters traveling from Redmond to southeast Bend use Deschutes Junction to go to Deschutes Market Road. Commercial trucks use the overpass to connect to eastbound US 20 on their way to the Burns, Ontario and points east. They do this to avoid stop-and-go traffic congestion and stop lights in northern Bend, near Cooley Road, Lowes, Home Depot, Target, and the Cascade Shopping Center.

- B. **Tumalo Place** is a paved county, two-lane, Rural Collector road that serves as the on and off ramp to the US 97. Tumalo Place was constructed in 1998. It is along the northern property line and crosses land that was formerly the Applicant's property. It connects US 97 with Tumalo Road. There is one dedicated 90-foot, truck-length, turn refuge on Tumalo Place into the subject property.
- C. **US Route 97** is a paved, four-lane highway maintained by ODOT, which forms the eastern property boundary and provides primary northerly access to Redmond, Madras, Yakima and Canada and southerly access to Bend, Klamath Falls, Weed, California and I-5. U.S. Route 97 is a major north-south United States highway. It begins at a junction with Interstate 5 at Weed, California, and runs northeast to Klamath Falls, Oregon and then goes north, ending in Okanogan County, Washington, at the Canadian Border. Across from Osoyoos, British Columbia it becomes British Columbia Highway 97 upon entering Canada. Major cities that lie on US 97 include Klamath Falls, Oregon; Bend, Oregon; Yakima, Washington; Ellensburg, Washington; and Wenatchee, Washington. For a time, the Alaska portion of the Alaska Highway was planned to be signed as US 97, with signs even being produced.

* * *

Prior to US 97 being constructed in Deschutes County, the north-south traffic was served by the road that is now called the Old Bend-Redmond Highway and the Huntington Wagon Road which became Huntington Road. Portions of Huntington Wagon Road are visible and interpreted on BLM land to the east of the subject site.

In 1932 the state constructed a new gravel two-lane north south road called the Dalles-California Highway, or US 97. It crossed the subject parcel as it was configured at that time. It was later paved. In 1992 ODOT widened it to 4 lanes with a turn lane into Tumalo Road and an off ramp and turn lanes into Deschutes Market Road. Due to many serious injury and fatal accidents, in 1998 ODOT and Deschutes County in a joint venture built the Deschutes Junction overpass that bisects the subject site.

In the ODOT report called 2015 Traffic Volumes on State Highways, at mile post 130.28 (130.28 miles south of the Washington -Oregon State Line) at a point 0.10 south of the "Bend-Deschutes Market Road", there was a total of 25,200 ADT, in both directions. ODOT also reported a 40% increase in truck traffic over three years on US 97 in Deschutes County.

* * *

While these plans and reports have a statewide and countywide focus, these reports quantify what is happening next door to the subject site and on the property itself.

D. US 20 is a paved, two to four-lane highway maintained by ODOT. It runs between Newport, Oregon on the west and the state of Iowa on the east while it crosses and connects to several interstate highways. In Oregon it goes through Corvallis, Bend, Burns, and Ontario. It is about 3 miles west of the subject site via Tumalo Road.

E. Deschutes Market Road is a paved county, two-lane, Rural Arterial road which connects to the Tumalo Road Overpass and provides a secondary access to Bend and US 20 east of Bend. The road offers a route to and from the St. Charles Hospital without going through Bend or encountering any stop lights.

The County TSP Update reclassified this collector back to its original Rural Arterial status. The road has seen growth in traffic volumes as northeast Bend has developed and since the completion of the Deschutes Junction interchange, which also removed an at-grade railroad crossing. Deschutes Market Road provides a parallel alternate route to US 97. Area cyclists enjoy the road for its comparatively good shoulders, proximity to Bend, and the ability to make a loop using Deschutes Market/Tumalo Road.

2009 traffic volumes 0.10 miles north of Hamehook 5,592 ADT

2008 traffic volumes 0.20 miles west of BNSF tracks 3,883 ADT

0.10 miles north of Hamehook Road 5,627 ADT

0.06 miles north of Butler Market Road 4,784 ADT

F. Huntington Wagon Road was cleared and then smoothed out with horse-drawn road graders in 1867. The Huntington Wagon Road was the first north-south road in Central Oregon. Traces of the road are still visible east of 19th Street and Merrill Road, where the Des Chutes Historical Society maintains an interpretive trail of the road about 1.5 miles east of the subject site. ...

Historically, this was the most important north-south road and at one time all of the dirt roads and trails in Central Oregon connected into it. When the early settlers came to Central Oregon in the first quarter of the 20th Century, Deschutes Junction was the important intersection of the Huntington Wagon Road, the Santiam Wagon Road, Horner Road and the local roads to Prineville and Burns. The subject site has unique comprehensive transportation access in every direction. According to former County Surveyor Mike Berry, Deschutes Junction has been a primary regional transportation hub since the late nineteenth century.

Road Noise: *The ambient traffic noise generated by the 25,600 average daily trips on Highway 97 at a point exactly adjacent to the subject property, a point a tenth of a mile south of the Deschutes Overcrossing, is loud and incessant on the Aceti property. The ADT and the noise are increasing yearly.*

No rebuttal evidence was presented to refute the Applicant's evidence regarding the site description.

F. CURRENT USE AND CONDITIONS ON PROPERTY: Mr. Aceti testified at the public hearing that the soil on the subject property is so dry that, when he attempted plowing in 1995-96, wind caused dust to drift across US 97 to such a degree that he was horrified he could have caused an accident. He testified that the soils are so poor that soil amendments, herbicides and pesticides required to increase productivity of the land would be cost-prohibitive. Mr. Aceti commented that he enjoys full support of surrounding property owners for the proposal because agriculture is inappropriate for the site.

Ms. Kliewer testified at the public hearing and noted the high noise level on the subject property due to the proximity of US 97, particularly between the hours of 6:00-9:00 a.m. and 3:00-7:00 p.m. She addressed a letter in support of the application, submitted by Carl Juhl, a livestock specialist, stated he would not rent the subject property for farming and that it was unsuitable for breeding or grazing livestock thereon. The above-ground rock outcroppings are dangerous and may wreck expensive farm equipment if used on the subject property.

Ms. Kliewer also addressed the fact that the subject property never had water rights through Central Oregon Irrigation District (COID). Water rights were purchased by Mr. Aceti through Swalley Irrigation District as part of a co-op. Because the property sits at a higher elevation, a pump and electricity is required to get water to the property, as well as easement rights to cross several properties. The property has not been irrigated for a long time. The Staff Report states that there are 19.71 acres of Swalley Irrigation District water rights on the property. Ms. Kliewer stated that the correct figure is 16 acres of irrigation water rights; Swalley reduced Aceti's allotment due to the land for the US 97 overpass approach having been taken by the County. The Applicant agreed to an in-stream lease of his irrigation water in response to a 2013 letter to the Applicant from Swalley. As noted on page 2 of the September 14, 2020 rebuttal letter from Ms. Kliewer, irrigating landscaping on rural industrial land is an approved beneficial use. As set forth below, public water (Avion Water) also is available.

The September 14, 2020 rebuttal letter from Ms. Kliewer states, in relevant part, on pages 1-2:

On page 2 [of COWL's testimony dated September 8, 2020], COWL states the subject property has been a "small farm" for over a century. That is also refuted in the application. The subject parcel was always a portion of the Deschutes Ranch and was never sold as a separate parcel by itself until Aceti bought it from the Barrett Brothers on contract. LUBA even made that distinction in its 2016 decision, that it was previously always part of a large ranch and never a farm on its own. See application pages 132-144, previous owners and how they used the property and the detailed section on irrigation history, 100-117.

There is no evidence presented that explores the feasibility or appropriateness of "a sparse settlement or an acreage homesite" on the small subject parcel. To the contrary, there is plenty of evidence in the record about the undesirability of the noise levels and lack of safety from cars entering the parcels at high speeds from the surrounding road network. The Bessman Traffic Report quantifies the volumes of traffic and the new roundabout. The application and testimony of Carl Juhl talk about the effect on livestock of the 24/7 road noise. Applying the applicable County EFU zoning code, minimum acreages for dwellings in EFU, required setbacks, easements and other constraints, it is likely that only one dwelling might be allowed on the parcel with many conditions of approval that may make the house impossible to permit. See Figure 33 on page 97.

Mr. Aceti submitted a letter dated September 15, 2020 including rebuttal evidence. Exhibit 2 is a June 28, 2019 Deschutes County Assessor's Office DISQUALIFIED letter for the special assessment of

20.26 acres of EFU land. This is notice that the farm tax deferral has been removed and that "potential additional taxes for disqualification are: \$13,981.72." Exhibit 3 to the letter is a tax account history from Deschutes County for the property (dated September 14, 2020) that shows the property taxes from 2014 to 2019 increased almost three hundred percent (300%) over that 5-year time period. Mr. Aceti states that approximately \$1,000 of the increase was due to the removal of the Farm Deferral program. He comments:

I would like to point out that no True Commercial Farm Operation could withstand this type of property tax increase with no change of existing buildings or property improvements in the past 20 years.

Page 88 of the Applicant's Burden of Proof describes the current use of the property as follows:

The property is currently being used within the limits of a conditional use permit, Deschutes County Decision, CU-97-72/SP-97-49.

The decision states, "The applicant/owner shall limit the commercial activities on the subject property to the following:

- a. *sales of hay and field crops grown on the subject property and/or on property in adjoining counties;*
- b. *sales and rental of specialized hay equipment, including hay squeezes and specialized hay trailers designed by the applicant, and*
- c. *storage and display for sale of hay and specialized hay equipment."*

The Applicant/Owner operates the Hay Depot part time from the northwestern portion of the property. He is not using the remainder of the land. It has sat fallow for 23 years. The Hay Depot business is at a low point. At its peak in 2005, it supported the livestock and haying industries in Central Oregon. The Hay Depot designed, fabricated and sold custom hay production equipment, repaired farming equipment, found buyers for the hay, marketed the hay for farmers, and provided consulting and custom farming for hay production. The Hay Depot sells bailed hay, both retail and wholesale. The Hay Depot transports hay to local horse ranches, cattle ranches and dairies by the thirty-ton truckloads. It was not uncommon to have an order for 250 tons per ranch or dairy in Central Oregon. It also transported the hay to the Portland shipyards for the markets in Asia. Farmers also store seeds and hay in the barn during the winter. However, many customers have sold their livestock because it costs too much to feed them through the winters. Demand for hay has varied.

Since 2000 a steady stream of people from out of state who are not farmers or ranchers have been purchasing land that historically has supported livestock ranching. They are purchasing rural land to enjoy the views, open spaces and recreational activities in Central Oregon. The competition for rural land has resulted in higher prices per acre that are not feasible for agriculture. Therefore, non-farm owners are moving in, farm sizes are dropping and the number of customers for hay is dropping. Ranches are not running as many cattle as they once were.

Also, the recession forced many hobby farmers out of the livestock business, because they could not afford to purchase hay and other necessary supplies for their horses, alpacas, llamas, goats, sheep and other livestock. Therefore, the local demand for hay, especially in the winter months, is dropping. Each year since 2008, the demand for hay has dropped to the point that the business is no longer profitable.

Currently, the storage building is used to store farm products, hay and seed, and for machinery storage. Seven acres are leased to Bonneville Power Administration (BPA). BPA temporarily

stores supplies necessary to maintain and up-grade high voltage transmission lines in the region. Other land is rented by companies for the temporary storage of port-a-potties, contractors, regional busses and tow trucks.

Pages 66-68 of the Burden of Proof state, in relevant part (images not included herein with text):

There are no structures on the 1.28-acre Tax Lot 161227D000104.

A 100-foot by 200-foot metal and pole storage building was constructed by the Applicant in 1995 in the northwest corner of the 20.26-acre Tax Lot 161226C000201. In 1999, the building was expanded to add a 12 x 80-foot office/shop and a 50 x 50-foot semi-truck loading dock. The building includes 23,460 square feet. The building is currently used to store, process and sell bales of hay, agricultural crops and seed and to manufacture, store, service and repair farm equipment and vehicles.

The building can store 70 truckloads of hay (2,100 tons of hay). It has a combination asphalt concrete and concrete floor with a concrete loading dock on the western side of the building. Nine 18 x 16-foot overhead doors allow trucks to enter the building for loading and unloading. An associated shop allows repair and fabrication of farm equipment and vehicles. An office provides space for the operation of the business.

The Applicant was given approval by the County to construct an additional 100 x 200 building on the lot in 1995. Unfortunately, the Tumalo Road approach to the US 97 overpass was constructed across the site for the second building shortly after the building permit was approved. An agreement between the Applicant and Deschutes County said the approved second building can be constructed anywhere on the existing property if it meets the required setbacks. However, the second building could not be re-sited on the north portion of the property because of the proximity to the overpass and the required setbacks that include new setbacks on each side of the new overpass itself.

The predominant structure on the site is the above-grade approach ramp to the Deschutes Junction Overpass over US 97. The approach ramp, Tumalo Road, and the US 97 Overpass is jointly maintained by Deschutes County and ODOT. The approach to the overpass on the subject property is about 800.69 feet long and tapers from 93 feet wide at the west end to 170 feet wide at the east end on the subject property.

A secondary structure is the perimeter fencing. The perimeter of the property is fenced with metal "T" posts and three strands of barbed wire. It is in poor condition and is in need of repair due to constant damage and destruction by vehicles crashing through it, especially at the northern property line that is adjacent to both the on and off ramps to US 97 on Tumalo Place. Many other vehicles on southbound 97 crash into the parcel. At speeds around 60 miles an hour, they often leave the highway, blast through the fence, and come to a stop in the middle of the parcel. One vehicle left US 97 southbound and ended up stuck into a pile of gravel in the center of the southern portion of the property.

The County fenced both sides of the right-of-way for the approach to the overpass with metal "T" posts and three-strand barbed wire. Some riprapped areas on the road divert precipitation from the roadway to the subject property.

The impact of the Deschutes Junction Overpass project is described at page 31 of the Burden of Proof:

After the overpass was constructed and the traffic system was changed, [Aceti] could not farm even a meager crop of hay on site. He couldn't get irrigation water to the site and even if he could, the overpass made any hand line sprinkler layout impractical. Other options such as attempting to dig a new pond in the northeast corner or to dig a well were explored without success. When one

looks at the rock and shallow non-resource soils, the small parcel size, the overpass bisecting the property and the heavy noisy traffic, it makes sense to find a different more appropriate use for the land.

After it was apparent that the parcel was not suitable for farming, Aceti did not farm it. He held fall fundraisers that he initiated and organized and that raised tens of thousands of dollars for local non-profit organizations. The festivals included creating a 100-ton hay maize and a haunted haystack from the tons of hay in his barn. (The hay was not grown on site.)

There is an active code enforcement case (File no. 247-19-000064-CE) in which the County has determined businesses are operating on the property in violation of the current EFU-TRB zoning.

Section 20 of the Burden of Proof (pages 100-117) establishes the history of irrigation and homesteads. It states, in relevant part, "Aceti has not irrigated his property since the Barrett Brothers did so in 1998, when they were co-owners, using their pond a half mile away and their pipes laid across their land, They no longer own any land in the area." Pages 107-08 of the Burden of Proof state that the US 97 widening project cut through a shared irrigation pond, reducing it by 75% and making it inoperable; the pond is dry this year. Because the widening project caused the irrigation system to become inoperable, ODOT paid the Barretts to have a new ditch from the Swalley Deschutes Lateral and a new pond dug along Half Mile Lane on the NW corner of TL 1100, ¼ mile from the SW corner of the subject parcel and separated from the pond by TL 1200. Any pipe or ditch to the subject parcel would have to cross TL 1200. When Aceti acquired the property in 1995, no water right, easement or written agreement was included in it to enable Aceti to irrigate his property. He has no easement or right to use either TL 1100 or 1200 or the equipment for delivery of irrigation water to the subject property.

No rebuttal evidence was presented to refute the Applicant's evidence regarding the current use of and conditions on the subject property.

G. SOILS: According to the Natural Resources Conservation Service (NRCS) maps of the Inclusion and Exclusion Sites, there are three mapped soil units.

36A Deskamp loamy sand, 0-3% Slopes. The NRCS data shows 85 percent of this soil unit consists of Deskamp soils, and 15 percent consists of contrasting inclusions. The Deskamp soils have a land capability classification of Class III with irrigation and Class VI without irrigation.

38B, Deskamp-Gosney Complex, 0-8% Slopes. The NRCS data shows 50 percent of this soil unit consists of Deskamp soils, 35 percent consists of Gosney soils, and 15 percent consists of contrasting inclusions. The Deskamp soils have a land capability classification of Class III with irrigation and Class VI without irrigation. The Gosney soils have a capability rating of Class VII with or without irrigation.

58C, Gosney-Rock outcrop-Deskamp complex, 0 to 15 % Slopes. The NRCS data shows 50 percent of the soil unit consists of Gosney and similar soils, 25 percent Rock outcrop, 20% Deskamp and similar soils, and 5 percent contrasting inclusions. The Gosney and Deskamp soils have the capability classifications as stated above. The Rock outcrop is Class VIII.

Soil Scientist Report. The Applicant submitted a more detailed soil study of the subject property conducted by (the late) Roger Borine, entitled Agricultural Soils Capability Assessment (hereafter "Borine study"), Attachment 2 to the Application. Attachment 2 includes: (1) a Soils Assessment Release Form dated January 2, 2013, submitted to the Department of Conservation and Development, Community Services Division; and (2) the Borine study, dated May 8, 2012. The late Roger Borine was a Soil Science Society of America Certified

Professional Soil Classifier #24918, Certified Professional Soil Scientist #24918, and a Professional Wetland Scientist #1707.

The Borine study provides and documents more detailed data on soil classification and soil ratings than is contained in the USDA-NRCS soil maps and soil survey at the published level of detail. This more detailed soils data is directly related to the NRCS Land Capability Classification system (LCC) designation. Page 5 states the following, among other things:

As defined by OAR 660-033-0020(1)(a)(A) Agricultural Land is land classified by the USDA Natural Resources Conservation Services (NRCS) as predominantly Land Capability Classification (LCC) 1-6. The LCC is a system of grouping soils primarily on the basis of their capability to produce common cultivated crops and pasture plants without deteriorating over a long period of time. The soil criteria used to determine the rating is coordinated nationally. Data elements, classes, or groups that are used in national legislation have strict adherence to national procedures. Guides that are developed by states to rate soil survey land classification and groups are reviewed according to a national procedure. USDA Natural Resources Conservation Service has developed and received national approval for their "Guide for Placing Soils in Capability Classes in Oregon" (Rev 6/1977). The Land Capability Classification (LCC) system is a soil interpretation for grouping of soil mapping units having similar potentials and continuing limitations or hazards.

The Oregon guide includes criteria for soil depth, surface texture, permeability, slope, available water capacity, drainage class, flooding/ponding, alkali/salinity, frost-free days, and evapotranspiration (irrigated and non-irrigated). Each component of a soil map unit is evaluated and assigned a capability class. The soils within a capability class are similar only with respect to degree of limitations in soil use for agricultural purposes or hazard to the soil when it is so used.

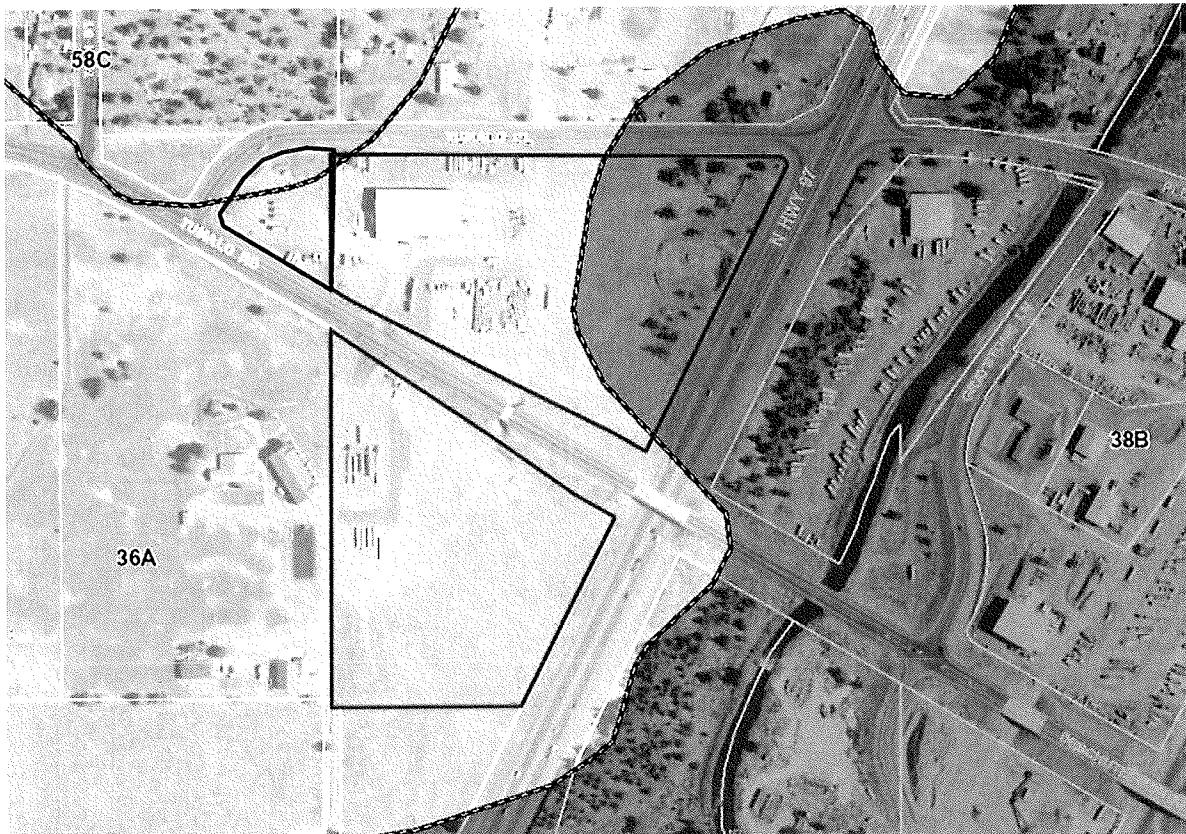
In this study area the soil depth and available water capacity (AWC) were the primary criteria for designating soil mapping units. AWC is the volume of water that should be available to plants in a soil holding water at full potential. When roots are excluded by bedrock this is considered the effective soil depth for plant growth. The Oregon LLC Guide rates having an AWC less than 2 inches as LCC 7 whether irrigated or non-irrigated and soils less than 10 inches deep as LCC 7.

The Borine study concluded the subject area consists of basalt lava flows and that the subject property is predominantly non-agricultural soils, Classes VII and VIII, applying soil mapping at an Order 1 level. Fifty-nine percent (59%) of the subject property is comprised of Gosney-Zeta complex soils (Class VII, irrigated or non-irrigated) and twenty-one percent (21%) of the subject property is comprised of Urban Land, miscellaneous area with essentially no soil and supports little or no vegetation. It is mostly agricultural buildings, land modifications for equipment movement, parking, crop storage, pond development and areas of fill material (Class VIII, irrigated or non-irrigated). Eight percent (8%) of the subject property is comprised of Deskamp loamy sand (Class VI non-irrigated; Class III irrigated). Twelve percent (12%) of the subject property is comprised of Gosney, Deep Deskamp complex (Class VI non-irrigated; Class III irrigated).

The Borine study concludes the inventory and analysis of this parcel determined that "approximately 80% (17.2 acres) is Land Capability Class VII and VIII soils; and 20% (4.3 acres) is Land Capability Class III-VI soils. The parcel as defined is not predominantly Agricultural Land."

Further, together with the LCC soil ratings as non-agricultural soils, the determination of suitability for farm use is "generally unsuitable" for the production of farm crops, livestock or

merchantable tree species based upon low fertility, limited soil depth for cultivation and ability to store and hold water, lack of forage production for livestock grazing, limited length of growing season and high levels of energy input with limited outcome.



Aerial photo with NRCS soil map overlay. (Source: Deschutes DIAL)

The Hearings Officer notes that no rebuttal evidence was presented to refute the evidence regarding soils. COWL's argument in its September 8, 2020 letter, that the property is suited for agricultural use and could be used as a small farm, is refuted by the Borine Study and has been rejected by LUBA in *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016), LUBA No. 2016-012, Final Opinion and Order (Remanded August 10, 2016). LUBA's rulings on this issue are detailed in the findings below. The County relied upon the Borine Study in determining that the Applicant's prior applications for re-designation and rezoning of the subject property (file nos. 247-14-000456-ZC and 247-14-000457-PA) were consistent with Goal 3. LUBA affirmed the County's determinations on all four factors, finding them to be supported by substantial evidence in the record. The Hearings Officer rejects COWL's arguments regarding agricultural lands as having been conclusively decided by LUBA.

H. SURROUNDING LAND USES: Zoning in the vicinity is mixed with EFU-TRB, EFU-AL, Multiple Use Agriculture (MUA-10), Rural Residential (RR-10), Rural Commercial (RC) and Rural Industrial (RI). The Applicant submitted a detailed table of surrounding uses by tax lots, dated December 2014, attached as Exhibit 11 to the Burden of Proof, pages 245-298, summarized below. Additional description of surrounding land uses is set forth in the Burden of Proof on pages 1-4, 15-19, 27-32, 34-36, 37-42, 49-56, 64, 117-132, 155-181, 189-190 and Figures 6, 7 and 19 therein.

Mr. Aceti testified at the public hearing that, in a 2.5 mile radius surrounding the property, approximately 1700 lots have been platted since the 1960s. There is no large farm/commercial farming activity in the surrounding area. Mr. Aceti testified that an additional 25-30 acres of rural commercial and rural industrial uses have been added over the past decade. The area is a key transportation hub. Mr. Aceti stated that there is not a better place for rural industrial than his property. Ms. Kliewer testified that

there are no commercial farming operations in the vicinity, only hobby farms on which the proposal will not have any adverse impact. As stated in the September 14, 2020 rebuttal letter from the Applicant, "No agricultural use is adjacent to the subject parcel, although two parcels are zoned EFU."

The City of Bend Sewage Treatment plant is about three miles southeast of the site. Two hydroelectric power plants, COID's Juniper Ridge Phase I Hydroelectric Plant and Swalley's Hydroelectric Plant are on either side of US 97 just south of Deschutes Junction. The Swalley hydropower plant is on the west side and COID's hydropower plant is on the east side of the highway. Both are visible from the highway. COID's plant is on the Pilot Butte Canal, which is piped for 2.25 miles south of the plant.

Nearly all of the 36 square miles in Township 16 South Range 13 East, WM, southeast of the subject site is owned by the US Government and managed by the Bureau of Land Management.

Unproductive BLM lands, officially named the Redmond-Bend Juniper Wayside, span the area south of the subject site in T16S, R12E, Section 34.

Long Butte is immediately north and west of the property. Long Butte is subdivided into 711 urban sized residential lots up to 3 acres in size platted in the various phases of Whispering Pines Estates.

Page 175 of the Burden of Proof sets forth the following information:

Rural and Urban Density Residential Subdivisions at Deschutes:

1. Starwood, 178 lots and houses,
2. Whispering Pines Estates, 1st Addition, 396 lots,
3. Whispering Pines Estates 2nd Addition, 285 lots,
4. Whispering Pines Estates 3rd Addition, 14 lots,
5. Whispering Pines Estates 4th Addition, 16 lots,
6. Rancho El Sereno, 39 lots,
7. Centralo, 9 remaining lots,
8. Glacier View, 13 lots
9. Glacier View 1st Addition, 30 lots,
10. Buena Ventura, 41 lots,
11. Winston Ranch, 15 lots,
12. An unnamed subdivision in the SE ¼ of the SE ¼ of Section 14, 11 lots.
13. A rural subdivision off Morrill Road, 20 lots,
14. Lots off Half Mile Road, 18 lots,
15. Boones Borough Subdivision, 1st Addition, 79 lots
16. Boones Borough Subdivision, 2nd Addition, 108 lots
17. Pohaku Ranch, 19

Total Platted Residential Lots in Deschutes Subdivisions: 1,291.

Total Residential Lots in Deschutes: 1,756.

Total Houses Built: 1,324.

84 Houses Built in Two Years Between 2004 and 2006

The Burden of Proof states, at page 156-59, in relevant part:

1,756-six residential lots are in the vicinity of the subject property, according to Tim Berg, GIS Analyst Programmer. Most are less than two acres in size and those in Starwood are 1/5 to 1/4 acre in size. No reasonable farmer would want to purchase and farm in this situation. Farming in such a

densely developed area is most challenging and is a health and safety risk for everyone, even for people driving through.

To ensure that there would be no adverse effects on agriculture from rezoning his property, the Applicant and his team did an exhaustive and detailed study of all tax lots within the vicinity, extending a mile in all directions. They photographed most lots, noted the actual uses of each one, and noted any agricultural use, irrigation pond, or pasture. They used the County Assessor's database to determine lots sizes, owner's names and the zoning. The results of that research are recorded in the table below.

The study found that the only agricultural operations in the vicinity are a few small (0.5 -20 acres) non-commercial pastures for cattle or horses and a one-acre hemp operation on Half Mile Lane. None is contiguous to the subject property. They concluded that the rezone will not adversely affect any agricultural operations.

Summary of the Adjacent Uses Study

1. Agricultural Uses

No active agricultural uses adjoin the subject property. This is not an agricultural area and it has been committed to urbanization since hundreds of urban-sized residential lots were created prior to 1970. No one in the vicinity makes their primary living through farming or agriculture. Most of the largest parcels have poor, rocky land that remain covered with native vegetation. Some small hobby-sized (0.5-20 acres) and large (over 120 acres) parcels to the south and east are zoned EFU, but are not agricultural and remain in juniper and sage scrub land, might be used for one residence, and are unimproved.

East: Over a half mile northeast of the subject site is a 16-acre inactive recreational cattle-cutting ranch called the "Used Cow Lot". It is irrigated pasture off Morrill Road, northeast of US 97 and Pleasant Ridge Road. It is owned and run by the owners of the Murray and Holt Automobile Dealership in Bend. It is partially covered in buildings.

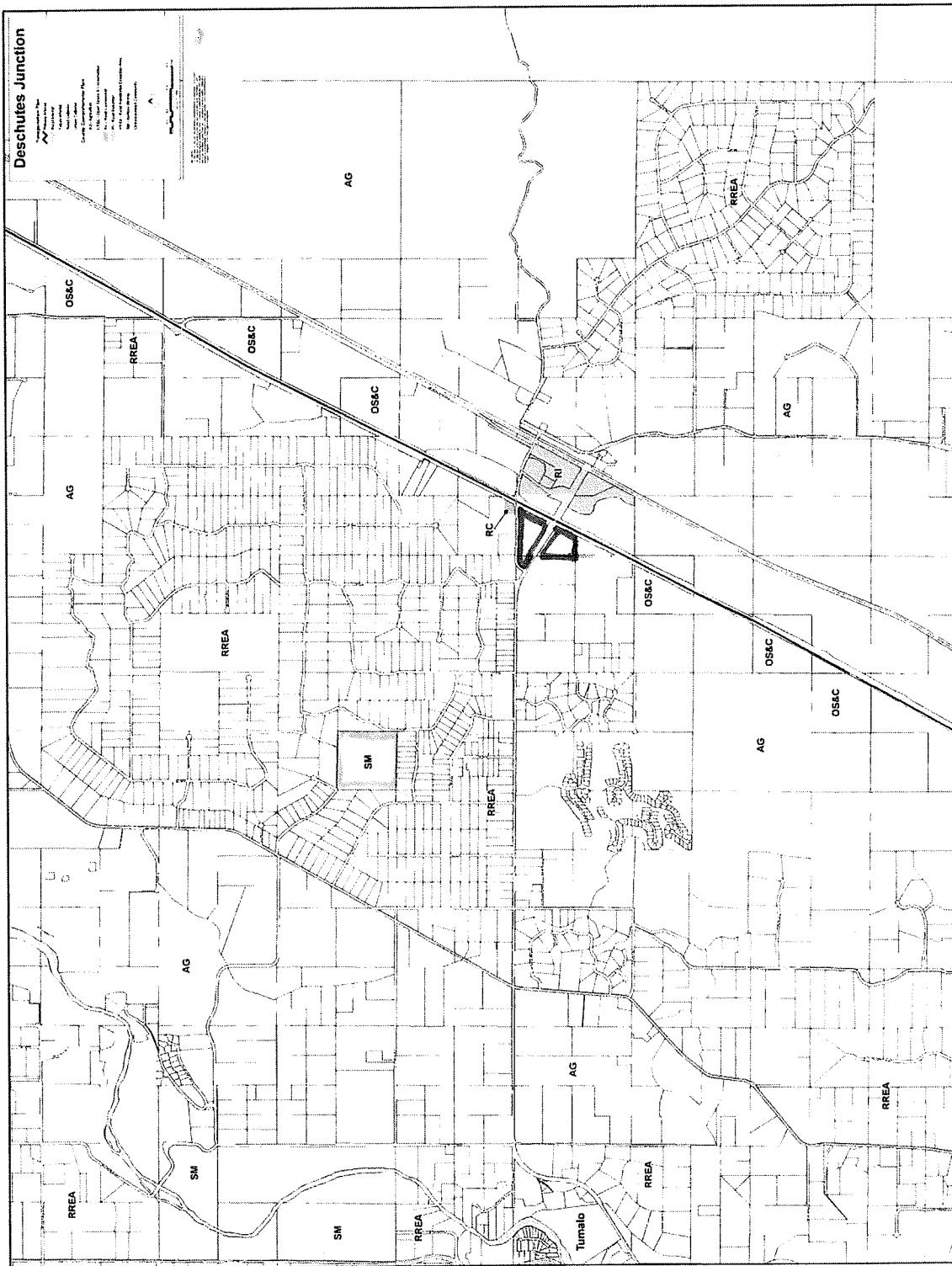
North: There is no agricultural use on Long Butte or within a mile north of the property. Residential and commercial uses cover the butte.

West: Along Half Mile Lane, a quarter of a mile to the west, an approximately 20-acre parcel had a horse racetrack and is in pasture for a few horses. The other parcels along Half Mile Lane are hobby farms/residences of 0.5 to 5 acres with a few head of horses, sheep, cattle, alpacas or llamas. Owners of two 0.5-acre parcels attempted to grow hemp last year. The largest parcel, the MUA-10 zoned 20-acre parcel with pasture for some horses may be partitioned into 20 homesites. Leroy Twiggs, who owns the land at 161227D000200 applied for 1-acre home sites under a Measure 37 claim. He plans to apply for partitions or a subdivision, when it is feasible.

South: There is no agricultural use south of the subject property. South of the adjacent 4.15-acres of rock spine and a rental house are several square miles of scrub land owned by the State of Oregon and federal government.

There is no farm that is the primary source of income for its owners a mile in any direction from the subject site.

**TIM BERG'S 2006 MAP OF 1,756 TAX LOTS in the VICINITY of DESCHUTES JUNCTION and
showing the COMPREHENSIVE PLAN MAP ZONING**



2. Nonagricultural Surrounding Land Uses:

East: Across US 97 to the east and beyond the EFU zoned strip of land adjacent to US 97, are RI zoned lands developed with Willamette Graystone (4.33 acres), a concrete products

manufacturing facility and a second business site, (formerly United Pipe) on the west side of Graystone Lane, is vacant. Farther to the east is the Burlington Northern-Santa Fe (BNSF) railroad tracks. Across US 97 to the southeast is land zoned RI and used for mineral processing. The two-room historic Deschutes School sits on a 1.09-acre parcel at 161226C0400, east of the subject property. It is currently used as a residence in a mobile home park.

Some of the businesses to the east include intensive industrial and commercial uses, Willamette Graystone masonry products for retail and wholesale sales, a RV storage business immediately east of the Applicant's land, 4-R Equipment, a historic school adaptively used as a residence, a mobile home park, Cascade Pumice that uses the BNSF railroad spur and a fuel distributor.

As set forth at pages 167-68 of Applicant's Burden of Proof:

John McCauley is purchasing the land owned by the Frances Ramsey Trust Agreement that own 9.05 acres of RI zoned land directly east of the subject property. McCauley runs the RV Storage business and uses the building for warehousing. It was formerly used as a large volume industrial pipe supplier with pipes stored on site.

Willamette Graystone is located on 4.33 acres east of the former United Pipe and Supply on 1226C000106. It manufactures, stores and sells rock and masonry units wholesale and retail.

Jack Robinson & Sons, Inc and a subsidiary, 4R Equipment, owns and uses 58.38 acres mostly zoned Rural Industrial and a railroad spur east of the subject property and south of Willamette Graystone. Tax lot 301 was rezoned about twelve years ago to Rural Industrial from EFU. Approximately half of Tax Lot 300 was rezoned to Rural Industrial in the last four years. Their property is used for truck and equipment repair shops, truck and heavy equipment parking, offices, customer and staff parking, materials such as sand and gravel storage, a rock crushing facility, a railroad spur, and parking of trucks that belong to other companies such as fuel tankers. Their web sites states, "Jack Robinson and Sons Inc. is a General Contracting firm that has been serving Central Oregon for the last 62 years. With 32 years of experience, Ron Robinson Jr., a third generation Robinson, has helped Jack Robinson and Sons become one of the most respected construction companies in the Central Oregon area. Jack Robinson and Sons has the resources to complete any size project, but specializes in large-scale excavation, commercial development, subdivision infrastructure, site layout, and public works improvement projects. Jack Robinson and Sons has acquired extensive knowledge of drilling and blasting rock for site development and utilities and has the knowledge, manpower and equipment for any size rock or dirt moving project. Our long history has also enabled us to develop long lasting relationships with subcontractors that perform concrete, engineering, paving, fencing, electrical, and other various services so that we can focus on giving our clients the best projects with attention to value and timeline. Our company prides itself on being self sufficient and capable of completing projects with very little or no involvement from the owner. Over the last 6 years Jack Robinson and Sons has experienced tremendous growth with annual sales of 20-30 million." "4R-Equipment LLC. owns and operates 7 rock quarries, 3 rock crushers and 35 trucks. 4R maintains material sources in Bend, Alfalfa, Horse Ridge, Madras, O'Neil and Redmond."

57.7 acres of RI zoned property are adjacent to the subject parcel on Tax Map 16 12 26C as follows:

- TL 102 (Jack Robinson and Sons, Inc.) 1.41 acres zoned RI
- TL 106 (Willamette Greystone) 4.33 acres zoned RI
- TL 107 (McCauley) 9.05 acres zoned RI
- TL 111 (Jack Robinson and Sons, Inc.) 18.69 acres zoned RI
- TL 114 (Jack Robinson and Sons, Inc.) 2.5 acres zoned RI
- TL 300 (Jack Robinson and Sons, Inc.) 12.9 acres of a 25.85 acre parcel zoned RI
- TL 301 (Jack Robinson and Sons, Inc.) 8.93 acres zoned RI

West: The square mile to the west contains 20 tax lots. The Three Sisters Adventist Christian School sits on 15.42 acres in tax lot 161227D000100. That parcel is zoned EFU-TRB but has been used exclusively as a school and residences for 35 years. It shares a north-south property line with Aceti's parcel. There are 19 houses on the remaining lots to the west. Southwest of the subject site is a fallow 30.45-acre parcel owned by a corporation, Eastslope Development, on tax lot 161227D001100. The corporation is a subsidiary of the Seventh Day Adventist Church. The owners plan to use the property for school-related uses in the future. Ten parcels near Half Mile Lane range from one to three acres and are residential. The six lots along the western section line of Section 27 are bordered by an urban density subdivision called Starwood.

The graveled 40-foot wide easement along the entire western property line on the subject property, 161226C000201, will be used during the construction of the roundabout at Tumalo Place and Tumalo Road, courtesy of a gentlemen's agreement between Aceti and the school. Subsidiaries of the Western Oregon Conference Assn, Seventh Day Adventists, East Slope Investment, LLC., own the .7.6 acres 161227D001300 and Rymilaka LLC owns the 30.45 acres in 161227D0011300 for future school and church facility expansion.

The community of Tumalo and the Deschutes River are 3.5 miles to the west via Tumalo Road.

North: At Deschutes Junction, on both sides of US 97 and both sides of Tumalo Road, Tumalo Place and Deschutes Pleasant Ridge Road are commercial, retail, wholesale and industrial businesses. Many were grandfathered in when the first DCCP was approved. The 29.04-acre lot directly north of the subject lots is split zoned Rural Commercial and MUA-10. It is used for logging, landscaping and log house construction businesses, a well drilling business and other uses, but had been used as a gas station, café and store since the late 1930s through the widening of US 97 in 1992 when ODOT took land along its eastern property line and the highway access.

The Roman Catholic Bishop of the Diocese of Baker owns 3.93 acres adjacent to Tumalo Place, north of the property at Tax lot 161226B000600. The acreage has a house, a mobile home and buildings used for manufacturing. They have been recently used to make wood posts and furniture. Since the 1940s, the property was the office for Cascade Pumice.

Tumalo Road borders the northern property line of the property. Property across the road to the north and northwest is zoned MUA-10 and is vacant or developed with single-family dwellings. Property to the northeast is MUA-10 and Rural Commercial (RC) and is developed with a building/landscaping supply business. The two adjacent parcels to the north are:

- 161226B000500 (29.04 acres) 27.27 acres are zoned MUA-10 and 1.77 acres are zoned RC and used for commercial businesses and storage of contracting supplies and materials.
- 161226B000600 (2.93 acres) This property is zoned MUA-10 and is used for rental housing, office and manufacturing.

Some of the businesses north of Aceti's property include:

1. Fagan firewood and landscape materials and services, Aiken water well drilling, logging contracting, and contracting company,
2. The Funny Farm, with several residences, and offering costume rentals, antiques and wedding services,
3. A large bus repair and bus resale business,
4. A pickup truck canopy sales business,
5. A business selling and renting shipping containers that are not modified for agricultural uses,
6. Rock Supremacy, LLC, at 65175 N. Hwy 97,
7. A mini-storage business,

8. And other smaller businesses. (See table of information by lot below.)

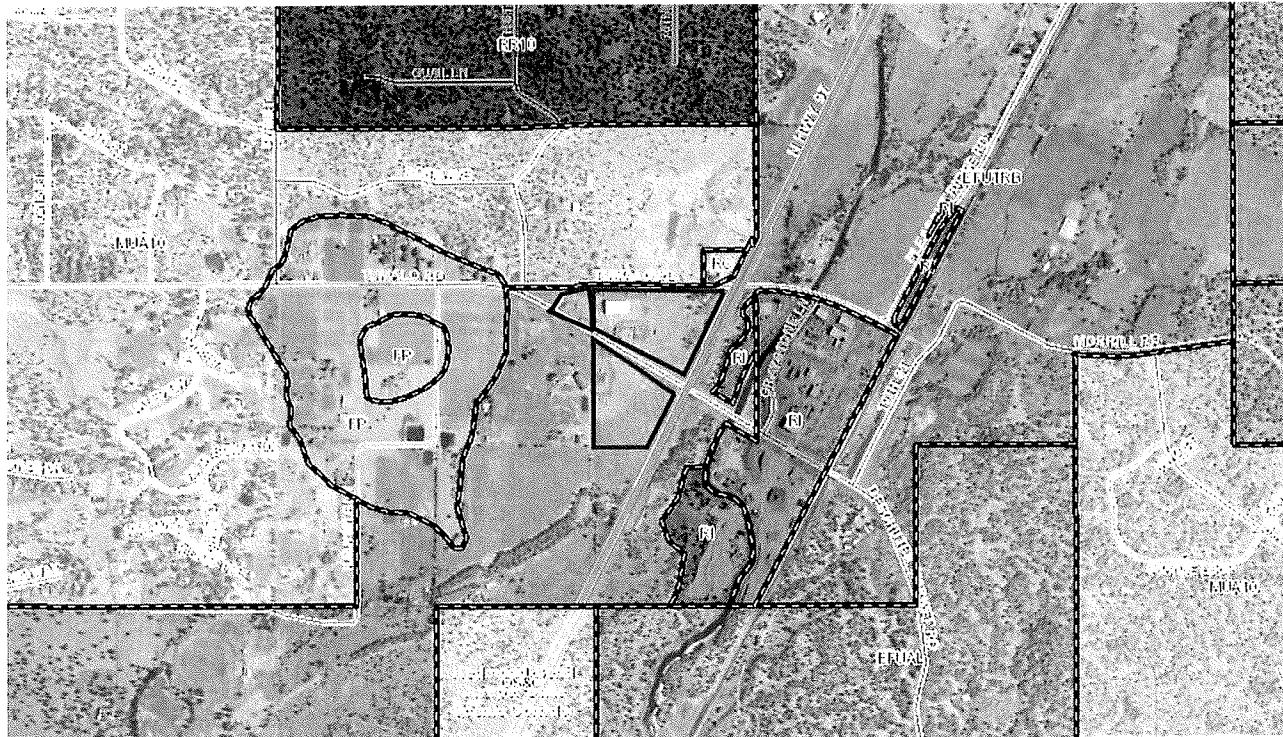
Rock Supremacy, LLC is a large company located in five states that drills rock, stabilizes embankments and drills tunnels for roads and railroads, among other things.

South: The parcels immediately to the south (161227D001300 and 161226C000200) have three rental houses and a barn that is no longer used. Parcel 161226C000200 is a pie-shaped 4.15 acre parcel zoned EFU-TRB and is developed with a rural residence. A non-functional small irrigation pond is next to the highway; the pond is dry this year. The property is not cultivated. To the southwest (16-12-27 1100) is an undeveloped parcel in farm tax deferral and assessed as having 26 acres of irrigation rights. There is no agricultural use south of the subject property. South of the adjacent 4.15 acres of rock spine and a rental house are several square miles of scrub land owned by the State of Oregon and federal government. The City of Bend acquired 1,500 acres to the south from the county, known as Juniper Ridge. Juniper Ridge is a quarter mile southeast of the subject property. A power plant for Swalley Irrigation District is directly south of the subject property.

There are no active agricultural uses adjoining the subject property. One agricultural use in the vicinity is east of US 97, one-half mile northeast of the subject site. There are no agricultural uses within one mile north of the property. Within one-half mile west of the property, two 20-acre parcels are in pasture and horses. There are 4 10-acre parcels along Half Mile Lane and some properties south of Tumalo Road (.5 to 5 acres in size) that may be characterized as "hobby farms" with a few head of horses, sheep, cattle, alpacas or llamas.

The property is located about 3.25 miles north of Bend and 6.5 miles south of Redmond via US 97. The center of the historical town of Centralo/Deschutes is about 1/8 mile east of the property, at the railroad tracks. The property is about 27 driving miles southwest of Prineville. Tumalo Road and US 20 connect Deschutes Junction with Sisters and Salem.

COWL asserts in its September 8, 2020 submission that the subject property is "surrounded on three sides by land zoned for exclusive farm use and is suitable for sparse settlement, a small farm (its use for over a century) or an acreage homesite." The Hearings Officer finds this assertion is not supported by substantial evidence. The argument the property is suitable for a small farm was rejected by LUBA in *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016). There is no evidence to support a finding that the subject property is suitable for sparse settlement or an acreage homesite.

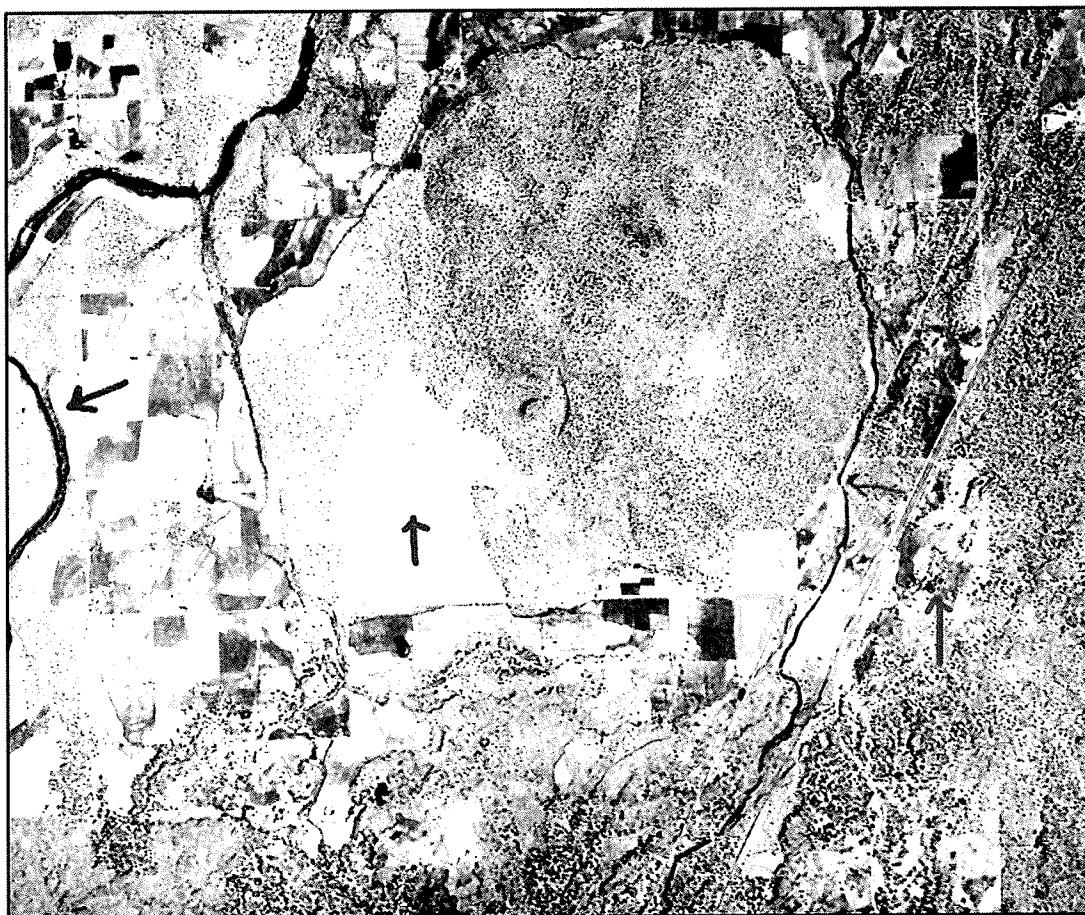


Aerial photo of subject property and surrounding area with zoning map overlay.
(Source: Deschutes DIAL)

I. PROGRESSION OF DEVELOPMENT: DESCHUTES, 1943 TO PRESENT: The Applicant's Burden of Proof includes a collection of aerial photos of Deschutes Junction presented in chronological order. They illustrate the continual parcelization and non-agricultural development at Deschutes. Thousands of acres were never cultivated. The photos in Figures 12-14 were taken when the homesteader James Low owned the Deschutes Ranch.

FIGURE 12. US ARMY 1943 AERIAL PHOTO, VIEW 1

Source: US Forest Service Bend Pine Nursery Surveyor Office



The purple arrow marks the Bend Airstrip that was west of the subject property on the southwest corner of Long Butte. The Deschutes Golf Course is on the right side of the railroad tracks northeast of the subject property, marked with a green arrow. The Deschutes River is marked with a blue arrow. The subject property is outlined in gold. The light shade of grey means it has not been irrigated or cultivated. The dark parcels are irrigated lands. The Pilot Butte Canal is marked with a red arrow.

FIGURE 13: US Army 1943 AERIAL PHOTO VIEW 2.

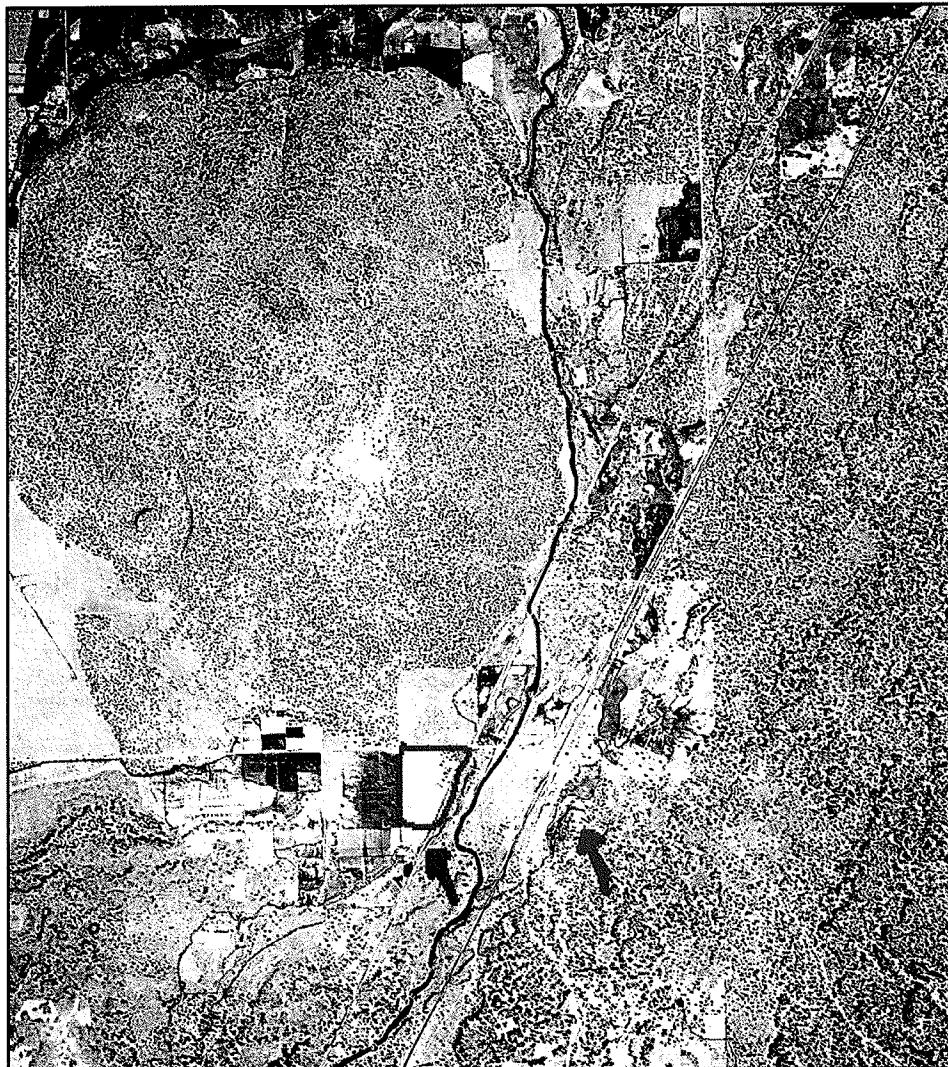
Source: US Forest Service Bend Pine Nursery Surveyor Office



The double track stop at the Oregon Trunk Railroad is shown in purple. Tumalo Road is marked in green. The Bend Airstrip is marked in red.

FIGURE 14: US Army 1943 AERIAL PHOTO VIEW 3.

SOURCE: US Forest Service Bend Pine Nursery Surveyor Office



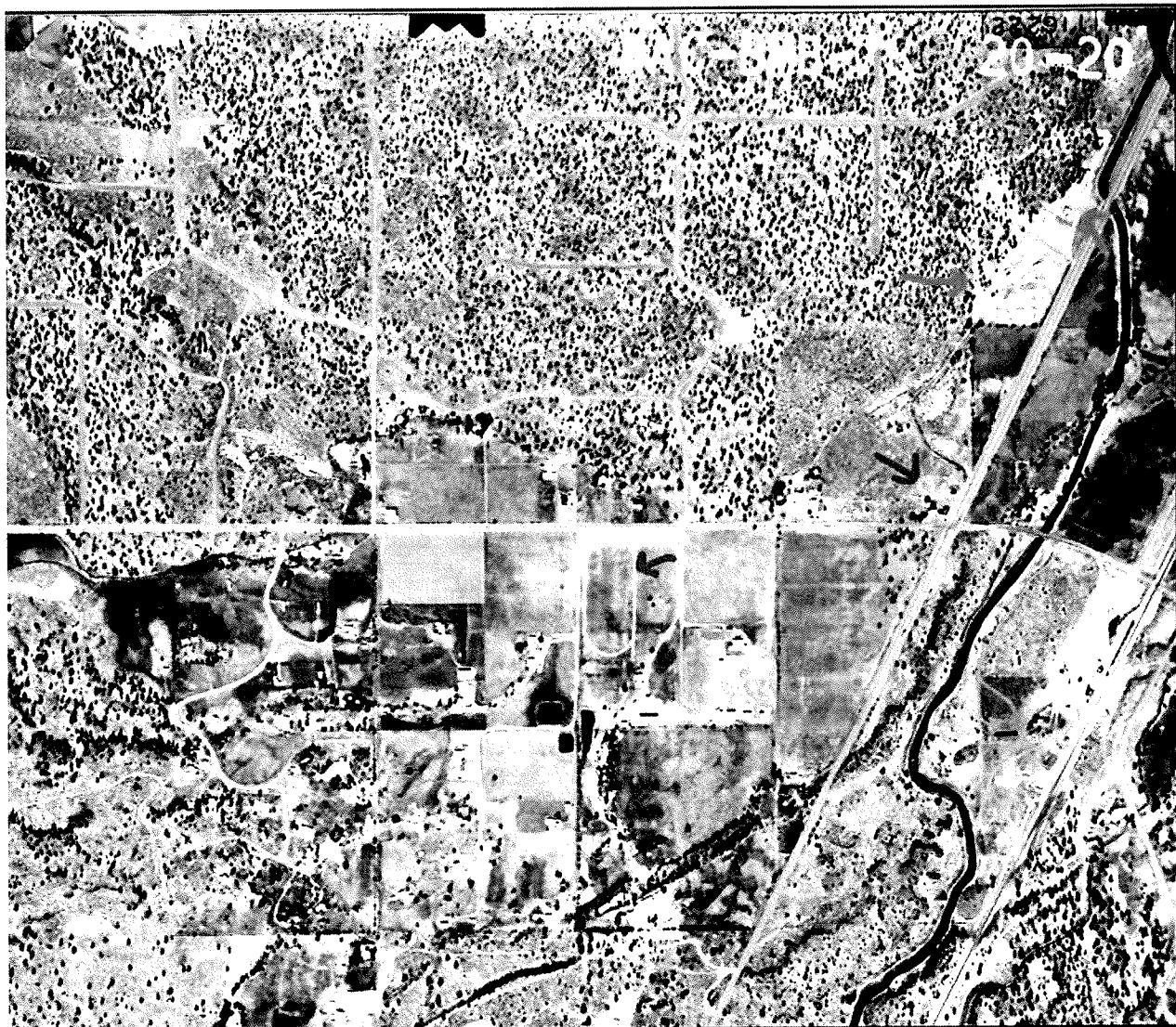
US 97, the Dalles-California Highway, was a graveled two-lane road at the time. It is indicated with a blue arrow. The town of Deschutes is shown with a green arrow.

FIGURE 15. May 25, 1965 ODOT AERIAL PHOTO



The subject property is outlined in red. The farm at the upper right is now the Funny Farm. The Deschutes café, Hancock service station, various businesses and three houses are on the property due north of the subject property.

FIGURE 16. BEND MAPPING & BLUEPRINTING AERIAL PHOTO OCTOBER 6, 1976 VIEW 1.



This photo was taken three years before the first Deschutes County zoning ordinance. Subdivision roads are constructed on Long Butte for Whispering Pines Estates subdivision and in Rancho El Sereno and other subdivisions. Land is broken up into 1/5 acre to 3 acre lots. The pumice operation is along the railroad tracks. The orange arrows points to the motorcycle racetrack, where commercial and industrial businesses are located today. A blue arrow points to the Hancock Gas Station, Café, and store on what is now the Fagan property. The purple arrow points to the horse racetrack.

FIGURE 17. BEND MAPPING & BLUEPRINTING OCTOBER 6, 1976 VIEW 2



A horse racetrack was used on the parcel west of the subject site, outlined in red. The racetrack is highlighted in orchid. The Swalley Canal is indicated by an orange arrow. The golf course is highlighted in yellow. The Pilot Butte Canal is marked in green. The blue arrow points to US 97, two lanes at that time. The double railroad tracks are highlighted with turquoise.

FIGURE 18. MAY 1994 GOOGLE EARTH IMAGE



This photo was taken in 1994, the year before Aceti purchased the subject property on contract from the Barrett Brothers. US 97 was enlarged to a four-lane paved highway in 1992. It shows the school, subdivided and portioned lots and dozens of homes constructed west of the subject property along Tumalo Road, Whispering Pines Estates, Rancho El Sereno, and Half Mile Lane. The subject property is highlighted in yellow. Industrial and commercial development has proceeded on the east side of US 97, indicated in orchid. United Pipe has constructed its building, indicated in turquoise.

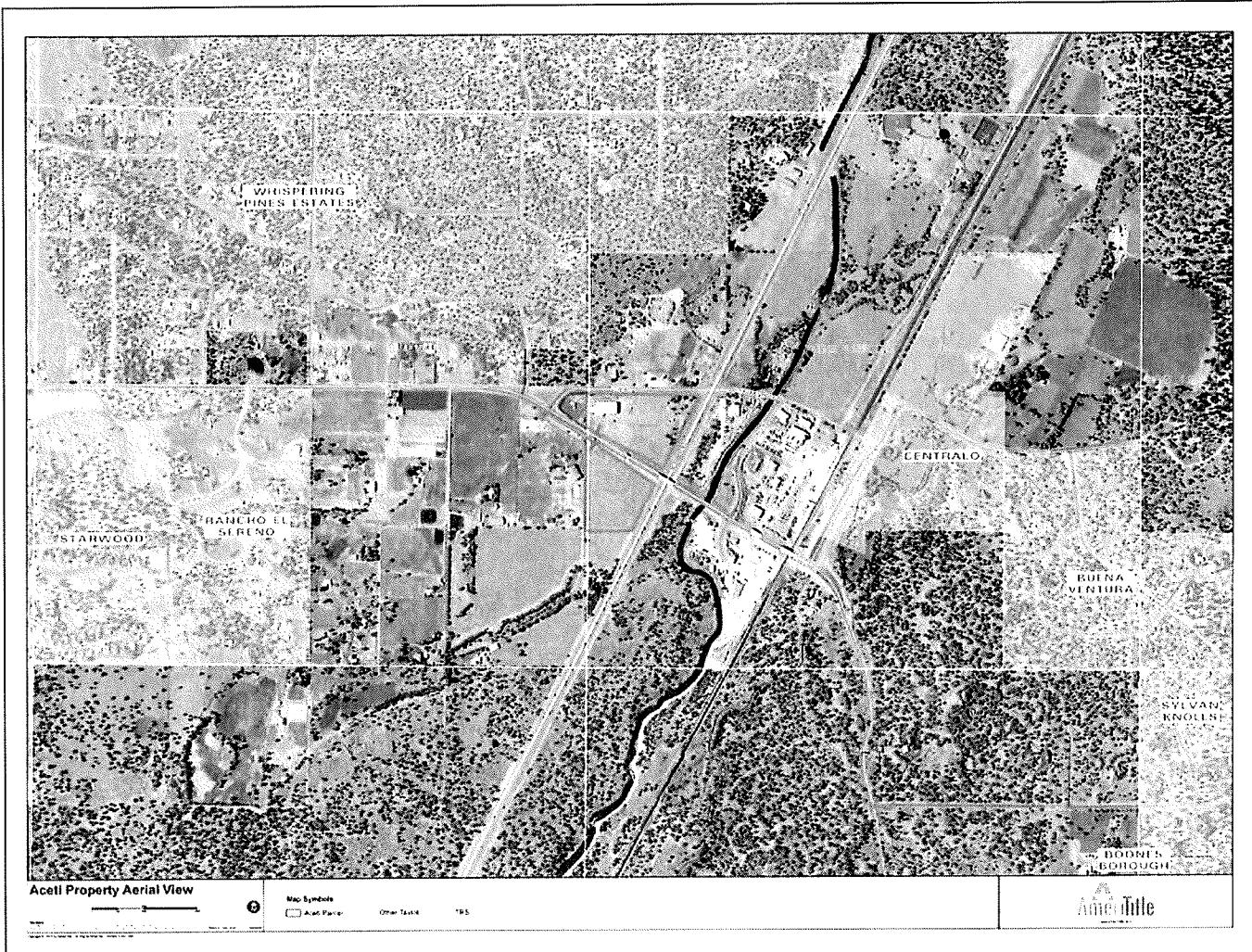


FIGURE 19. 2000 AMERITITLE AERIAL PHOTO WITH SUBDIVISIONS

Rural and Urban Density Subdivisions in the immediate area with dates of plat and lots.

DATE of FIRST PLAT	NAME	NUMBER OF LOTS
1911	Centralo	(1911) 465
		(2020) 9
1967	Rancho El Sereno,	39
1968	Whispering Pines Estates	711
1969	Glacier View	43
1977	Sylvan Knolls	26
1978	Buena Ventura	41
1978	Pohaku Ranch	19

1978	Boones Borough	187
1978	Winston Ranch	15

There are other partitions that are included in this total, such as on Half Mile Lane.

The Hearings Officer notes that no rebuttal testimony or evidence was presented to refute the evidence regarding the progression of development detailed in the finding above.

J. LAND USE HISTORY: The subject property has been part of the following land use applications:

- LR-89-148 - Lot of Record determination for tax lot 201 (included two other tax lots).
- RN-91-11 - Road name change from Nichols Market Road to Tumalo Road (affected all of Nichols Market Road).
- LM-95-63 - Landscape Management Review for a barn.
- CU-96-4 - Replace the intersection of Deschutes Market Road and Tumalo Road with a grade separated interchange (Deschutes County was the applicant).
- CU-97-72/SP-97-49 - Conditional Use Permit and Site Plan for commercial uses in conjunction with farm use.²
- LL-99-19 - Property Line Adjustment for the property
- MC-99-1 - Modification to CU-97-72/SP-97-49 to include the word processing in the approval and expand the hours of operation and daily truck-trailer operations.
- MC-02-12 - Modify CU-97-72/SP-97-49 to expand the commercial activity in conjunction with farm use. This application was denied.
- MC-07-5 - Modified CU-97-72/SP-97-49 to expand commercial uses at the site.
- 247-14-000456-ZC/457-PA – Zone Change from EFU to RI and Plan Amendment From Agriculture to Rural Industrial. Approved with conditions by the Deschutes County Board of County Commissioners (BOCC) on January 6, 2016 via Ordinances 2016-001 and 2016-002.
- 247-16-000593-A – Initiation of LUBA Remand of 247-14-000456-ZC/457-PA to repeal the portion of Ordinances 2016-001 and 2016-002 approving an exception to Goal 14 and to reaffirm the decision to change the Comprehensive Plan designation and zoning map from EFU-TRB to RI for the subject property. Approved by the BOCC in Ordinances 2016-027, 2016-028, 206-029 and 2016-030.

The Burden of Proof at pages 28-32 addresses in detail the condemnation actions and negotiations between Aceti and Barrett (Aceti was purchasing the property on contract; Barrett remained owner of record) with ODOT and the County in 1996-97 for the taking of a portion of the property (approximately three acres) for construction of a new overpass and road alignment. Page 30 states, in relevant part:

² The Applicant submitted evidence that the 1997 approvals included approval to construct an additional 100x200 foot building on the property. However, the overpass was constructed across the site for the second building shortly thereafter in 1998. The second building could not be re-sited on the north portion of the property due to the proximity to the overpass and the new setbacks required on each side of the new overpass. Aceti and the County entered into an agreement pursuant to which the County agreed the second building can be constructed anywhere on the property provided it meets setbacks. In 1998, Aceti sold and traded land to the County and to ODOT for Tumalo Place, the on and off ramps to US 97 and the Deschutes Junction Overpass Project. Aceti granted a 40-foot wide easement along the west side of the property for ingress and egress to the property southwest of his and a 20-foot wide easement to Avion for the north-south length of his property. He donated 15 feet of property along the northern boundary of TL 201 (approximately 1,000 feet long) to the County for the purpose of widening Tumalo Place right-of-way so the left-hand turn lane onto his property could be constructed.

Rezoning the property from EFU to Rural Service Center or Rural Industrial was discussed at length in county meetings and the BOCC agreed that it was appropriate to rezone the property to a non-agricultural zone at that time. However, as talks progressed, the county's planning director told Senator Ben Westland that the county could not rezone a property by signing a contract with the owners and the zoning could not be changed through a deed or Settlement Agreement and it must go through a land use application process. However, the county told Aceti he must apply for the zone change and he would likely have to contract for legal help to complete the application.

The county attorney did write in the settlement agreement (See EXHIBIT 6) (item 9.I)

SETTLEMENT AGREEMENT BETWEEN ACETI AND DESCHUTES COUNTY

"Subject to paragraph 12 hereof, Public Works agrees not to oppose a subsequent comprehensive plan change or rezoning of the Aceti property from EFU to rural service center, rural industrial, or other similar plan or zone designation."

Page 31 of the Burden of Proof states, in part:

Deschutes County questioned whether or not [Aceti's] custom hay growing and hay brokerage business was an agricultural activity allowed in the EFU-TRB. Therefore, in June 1997, [Aceti] applied to Deschutes County to conduct a commercial activity in conjunction with farm use. CU-97-72/SP-97-49, was approved with conditions on Nov 21, 1997. More code enforcement complaints would follow through the years.

The subject application to re-designate and rezone the subject property differs from the Applicant's previous application submitted in December 2014 (file nos. 247-14-000456-ZC/457-PA) as follows. First, due to the County's need for land for a roundabout at the intersection of Tumalo Road/Tumalo Place, the acreage of TL 104 is reduced to 1.28 acres. Second, the application for an exception to Goal 14 has been deleted. The Applicant submits that, "The sections of the Deschutes County Comprehensive Plan 3.4 that resulted in LUBA's reversal of the local approval of the application have been amended and paved the way for this application."

Mr. Aceti testified at the public hearing that he just signed paperwork in the condemnation proceedings for the new roundabout on the west side of the property. Mr. Aceti believes that additional property may be required to accommodate future transportation projects to prevent traffic backups onto US 97. Mr. Aceti has also granted a temporary easement for the project.

K. PRIOR DECISION-MAKING ON REDESIGNATION AND REZONING OF PROPERTY: The Applicant attached copies of the following decisions to the application:

- LUBA No. 2016-012 Final Opinion and Order
- LUBA No. 2017-009 Final Opinion and Order
- LUBA No. 2018-126 Final Opinion and Order
- Oregon Court of Appeals Decision, 2017009; A165313 (288 Or App 378 (2017))
- Oregon Court of Appeals Decision, 2018126; A170693

The Applicant's attorney, Bill Kloos, Law Office of Bill Kloos PC, submitted copies of the following two LUBA decisions with his September 15, 2020 rebuttal submittal:

- *Shaffer v. Jackson County*, 17 Or LUBA 922 (1989)
- *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014)

The application materials include the following summary of the Applicant's efforts to re-designate and rezone the subject property:

The Applicant submitted a similar application, 247-14-000456-ZC and 247-14-000457-PA, about the same parcels with the County Planning Division on December 31, 2014. He requested that the Deschutes County Board of Commissioners change the Comprehensive Plan designation of his property from Agriculture to Rural Industrial and change the Zoning Designation of the property from Exclusive Farm Use Tumalo/Redmond/Bend Subzone (EFU-TRB) to Rural Industrial Zone (RI). The BOCC approved those applications with conditions. Those BOCC decisions were appealed to the Oregon Land Use Board of Appeals (LUBA) by Central Oregon LandWatch (COLW).

The application demonstrated that it met the applicable criteria, no person opposed the application and it had widespread oral and written support by farmers and ranchers in the county, previous owners and all the surrounding property owners. The 2014 application took nearly three years and was completed on October 18, 2017 when the Oregon Court of Appeals agreed with LUBA that the County's Comprehensive Plan at the time limited new Rural Commercial and Rural Industrial land to three listed exception areas including Deschutes Junction, but the subject parcels were not included in the list of exception areas.

However, the courts offered a remedy. The LUBA decision [LUBA No. 2016-012] stated that the court agreed with the County that the Rural Industrial designation would not be limited to the three exception areas listed on DCCP Section 3.4, provided that the County amends DCCP Section 3.4 to remove language that limits application of Rural Industrial designation to the three identified sites, or expressively broadens application of the Rural Industrial designation to other sites deemed to be eligible under DCC [P] Section 3.4 for the Rural Industrial plan designation. The BOCC took the action that was recommended to amend the DCCP in 2018 and grant itself the authority to rezone land to RI. That amendment allowed this application to go forward. COLW appealed that BOCC decision. LUBA rejected every argument. COLW appealed LUBA's snub to the Court of Appeals and the Court of Appeals affirmed LUBA.

The following are the steps in the previous applications and the County's resulting text amendment to remedy the problem with the Comprehensive Plan.

1. *The County Board of Commissioners Ordinance No. 2016-001, dated January 6, 2016, granted the Applicant's request to amend the Deschutes County Comprehensive Plan, Sections 5.10 and 5.12, to adopt an Exception to Goal 14 and to change the Plan Designation for his two parcels from Agriculture to Rural Industrial.*
2. *The County Board of Commissioners Ordinance No. 2016-002 dated January 6, 2016 granted the Applicant's request to change the zoning designation on the Applicant's two parcels from Exclusive Farm Use (EFU-TRB) to Rural Industrial (RI).*
3. *COWL appealed the two ordinances (No. 2016-001 and No. 2016-002) to LUBA. The appeal was called LUBA No. 2016-012, Central Oregon LandWatch Petitioner vs. Deschutes County respondent and Anthony Aceti and Steve Mulkey Intervenors-Respondents. The case resulted in the LUBA Final Opinion and Order on August 10, 2016. This order remanded the ordinances back to the County because no exception to Goal 14 was needed and granting an exception to Goal 14 created an unintended consequence. Granting an exception to Goal 14 would have allowed urban uses on the two parcels and that was not the intention of either the Applicant or the County. The Applicant did not apply for urban uses.*

LUBA found that Aceti did not need to apply for an exception to Goal 14 and the BOCC did not need to grant an exception to Goal 14 in order to rezone the property to RI. LUBA wrote, "The only reason for approving such an exception that we can think of is to authorize urban uses of rural land" (Page 27 lines 9-11). LUBA found that the Applicant did not request that the County authorize any

urban uses on rural land, therefore no exception to Goal 14 was needed. Rural Industrial uses are not urban uses. LUBA found that all of the uses addressed in RI zoning code 18.100.010 and 18.100.020 are rural uses and are not urban uses.

The other key finding of the LUBA Decision was that the county correctly determined that “the property does not qualify as agricultural land under OAR 660-033-0020 (1)(b)” (Page 18 lines 11-13).

4. On October 10, 2016 the Applicant, Aceti, submitted a request for remand procedures with Deschutes County, numbered 247-16-000593-A. He asked for approval of the application without the Exception to Goal 14. A BOCC work session was held on October 24, 2016 in which staff explained the remand and the current request to proceed on remand. That meeting was followed by a public hearing on November 2, 2016.

5. The BOCC approved County Ordinance No. 2016-027 on December 28, 2016. The County Ordinance No. 2016-027 addressed the fact that the Applicant did not need to apply for an exception to Goal 14, because only rural uses are allowed in the RI zoning code, not urban uses, and the Applicant was applying for a zone change for uses that are permitted under the RI code. (He would have to apply for an exception to Goal 14 only if he was applying for an urban use. He was not.) The reference to an exception was deleted from the previous ordinances.

6. COWL appealed the County Ordinance No. 2016-027 to LUBA on January 17, 2017.

7. On June 15, 2017 LUBA’s Final Opinion and Order for LUBA No. 2017-009 reversed the BOCC’s decision on a new topic. The court found that the County’s Comprehensive Plan allows new Rural Industrial zoning in only three designated exception areas, and that the Comprehensive Plan must be amended by the BOCC to allow designation in additional areas before it can take the action it did on the Aceti parcels.

8. Deschutes County did not agree with LUBA’s interpretation of its Comprehensive Plan and appealed LUBA’s decision to the Oregon Court of Appeals.

9. On October 18, 2017 the Court of Appeals of the State of Oregon, (Central Oregon LandWatch, Respondent and Cross Respondent v. Deschutes County, Petitioner and Cross- Petitioner, Land Use Board of Appeals Decision Number 2017009, A165313) agreed with LUBA and upheld the LUBA decision.

On page 15, lines 2-9, LUBA wrote, “Although we need not resolve the issue, we also tend to agree with the county that the Rural Industrial designation is not necessarily limited the three exception areas listed on DCCP Section 3.4, provided the county first amends DCCP Section 3.4 to remove language that limits application of Rural Industrial designation to the three identified sites, or expressively broadens application of the Rural Industrial designation to other sites deemed to be eligible under DCC [P] Section 3.4 for the Rural Industrial plan designation.”

10. In March 2018 County legal and planning staff, with input from Aceti’s attorney and planner, began scoping out text amendments to the Deschutes County Comprehensive Plan (DCCP) to fix the problem in the DCCP that was identified by LUBA.

In April 2018 the County initiated amendments to the DCCP under Planning Division File No. 247-18-0004044-PA. The Planning Commission and BOCC considered the new text amendments to give the County the authority to approve site-specific applications to plan designate and zone property to rural Commercial and Rural Industrial uses so long as the application is consistent with all state and local land use regulations.

In May 2018 the County staff took the draft amendments to the Deschutes County Planning Commission. The Planning Commission considered and discussed the proposed amendments during two meetings and recommended that the BOCC approve them on July 12, 2018. The BOCC held a public hearing on August 20, 2018. The ordinance that amended three relevant sections of the Comprehensive Plan and included findings was approved as Ordinance No. 2018-008 on September 26, 2018.

11. COWL appealed the County's Ordinance No. 2018-008 to LUBA. COWL presented six assignments of error.

12. On March 20, 2019, LUBA denied all six of the arguments presented by COLW. The LUBA Final Opinion and Order No. 2018-126 affirmed the Deschutes County Ordinance No. 2018-008 that included text amendments to the Comprehensive Plan.

13. COWL petitioned the Court of Appeals of the State of Oregon to review LUBA's decision. The Court of Appeals affirmed LUBA's decision without opinion (AWOP), making the LUBA Final Opinion and Order stand. Deschutes County Ordinance No. 2018-008 stands.

Because the summary above was excerpted from the Applicant's application, the Hearings Officer's review of the decisions is separately set forth below in the Conclusions of Law.

L. PUBLIC AGENCY COMMENTS: The Planning Division mailed notice to several agencies and received the following comments:

Deschutes County Senior Transportation Planner, Peter Russell

I have reviewed the transmittal materials for 247-20-000438-PA/439-ZC to change the Comprehensive Plan designation from Agricultural to Rural Industrial and change the zoning from Exclusive Farm Use (EFU) to Rural Industrial (RI) on 21.56 acres at 21235 Tumalo Road, aka County Assessor's Map 16-12-26C, Tax Lot 201 and 16-12-27D, Tax Lot 104.

The applicant has submitted a traffic impact analysis (TIA) dated June 1, 2020. I agree with the TIA's assumptions, methodology and conclusions, but do not completely agree with the proposed mitigation for the intersections of Tumalo Road/Graystone Lane (technically, this is Deschutes Market Road/Graystone Lane) and Graystone Lane/Pleasant Ridge Road. The TIA discusses property donations or acquisitions for future roundabouts as a mitigation and pro-rata fee based on trip rates. The County disagrees. As development actually occurs on the site, assuming the comprehensive plan and rezone are approved, the County will assess transportation system development charges (SDCs) on that development. The current SDC rate is \$4,488 per peak trip. The County changes its SDC every July 1, per Board Resolution 2013-059. The actual SDC is based on the rate current when building permits are pulled, not the SDC rate when the land use is approved. The SDCs will mitigate the transportation impacts of the subsequent rural industrial development. Additionally, at time of future development, further traffic analysis may be required, depending on whether a future proposed development triggers the traffic analysis thresholds of Deschutes County Code (DCC) 18.116.310(C)(3). The County may also consider non-infrastructure mitigations (as an example, for manufacturing uses, start/stop times for workers would occur outside of the 7-9 a.m. and 4-6 p.m. peak hours), which are allowed under the Transportation Planning Rule (TPR) at OAR 660-012-0060(11).

The property accesses both Tumalo Place and Tumalo Road, County-maintained roads, which have access permits approved by Deschutes County (SW4040 and SW 4051) and thus complies with DCC 17.48.210(A).

Deschutes County Road Department, Cody Smith

I have reviewed the application materials for the above-referenced file numbers to change the Comprehensive Plan designation from Agricultural to Rural Industrial and change the zoning from Exclusive Farm Use (EFU) to Rural Industrial (RI) on 21.56 acres at 21235 Tumalo Road, aka County Assessor's Map 16-12-26C, Tax Lot 201 and 16-12-27D, Tax Lot 104. I concur with the comments submitted by Peter Russell, Senior Transportation Planner, on August 25, 2020.

Oregon Department of Transportation Region 4, Done Morehouse, Senior Transportation Planner

The comments below on the Aceti Traffic Impact Analysis are from Dave Hirsch in our Traffic Unit

- *Page 6 – Please state what the appropriate growth factors are and which ATR was utilized*
- *Page 8 – Year 2020 Operations Analysis – Please convey if these generated volumes are based on 2016 collected volumes grown with the appropriate growth factor cited in Page 6*
- *Pages 10, 13, 15 – It would be helpful to add a statement as to the ADT and peak hour traffic along US 97 and how close those traffic volumes are to the capacity of the US 97 road section. This could give insight into the availability of gaps to/from US 97 and Deschutes Market Road and if this could lead to a safety problem or not. In the Mitigation Measures section on page 15 it is stated that ODOT should evaluate the acceleration/deceleration lanes in the future. Analysis to support this based on expected operation and safety performance would be helpful.*
- *In general there was not a safety evaluation completed to look at current crashes at the project intersections and potential crash/safety issues.*

The following agencies did not respond: Central Electric Cooperative, Swalley Irrigation District, Deschutes County Assessor, Deschutes County Building Division, Deschutes County Environmental Soils, Avion Water Company, Pacific Power and Light, Redmond Airport, Watermaster – District 11.

M. PUBLIC COMMENTS: The Planning Division sent notice of the proposal to all property owners within 750 feet of the subject property, at least 20 days prior to the public hearing. Notice of the public hearing was also published in the Bend "Bulletin" newspaper, and the subject property was posted with a notice of proposed land use action sign.

The application materials include letters of support for the proposal (Attachment 3) as summarized on page 18 of the Burden of Proof. The application is supported by all adjacent property owners. No property owner opposed the previous application, and no person is known to be in opposition to the current application. As discussed below, COWL opposes the application.

Mr. Aceti enclosed an additional support letter from Jamie McCright, President of Milann Farms Inc. with his September 15, 2020 rebuttal submission. Mr. McCright states that he is a third generation farmer and a contract farmer and hay and commodities broker. Mr. McCright has rented a portion of the property from Mr. Aceti for the past 2 years to park trucks, trailers, bailers and other equipment. He stated he recently stopped an employee from using a Fail type of equipment on the property because the rotating metal hammers that touch the ground were creating sparks from rocks in the soil. This could have ignited the dry weeks and created a fire hazard to the area. He summarizes:

I would like to say that I cannot find a location in the city of bend that I can accommodate my Operation with this kind of safe access and space for my extra-large trucks and equipment. I provide service and products to local farms, in and round, Bend, Tumalo, Terrebonne, Alfalfa, Redmond, Sisters, Powel Butte [sic], Prineville and Madras. There is a great demand for Rural Industrial land because the RI land across Highway 97 is built out with none to spare. There is not a better location for RI uses in the rural county that I can justify.

Additional letters in support of the application include the following comments, summarized below:

- Deschutes Junction is a hub for Rural Industrial and Rural Commercial uses currently and historically
- Existing Rural Industrial businesses in the Deschutes Junction area have expanded and properties have been rezoned to accommodate new growth
- Rural Industrial land in the county is in short supply and cannot meet demand
- Deschutes Junction has excellent and safe transportation access, including access points from the Highway 97 overpass
- Deschutes Junction is no longer characterized by farming uses
- The requested rezone to Rural Industrial would be a good fit with other uses in the area
- Poor soils and irregular sized parcels are difficult to farm; the proximity of the parcel to Highway 97 and bisection of the parcel by the overpass also negatively impact farming uses, including grazing livestock
- Having rural services in the area will benefit the community and efficiently fulfill needed family wage jobs and services
- The requested zone change will be more reflective of the current neighborhood and more financially sustainable; it will conserve resources by allowing local residents to travel shorter distances for services and will provide additional revenue and tax base for the county
- The requested zone change will improve the appearance of the area

COWL appeared through Carol Macbeth and provided testimony and argument in opposition to the application. Ms. Macbeth stated that just because a parcel of land is considered "too small" does not mean it is not suitable for farming. She stated the property has been used for agriculture in the past. Ms. Macbeth cited a Bend Bulletin newspaper article in which Mr. Aceti was described as a hay famer during the condemnation proceedings for construction of the overpass. Mr. Aceti was quoted as stating the underpass was needed to move cattle back and forth from one part of the property to the other.

Ms. Macbeth also argued that all uses that may be permitted outright in the Rural Industrial zone are not rural uses, taking exception to the Staff Report. She further stated that the change in the DCCP, adopted via Ordinance No. 2018-008 does not allow rezoning and re-designation of any property to Rural Commercial or Rural Industrial; any such application is still subject to Goal 14. Ms. Macbeth argued that the Oregon Supreme Court has ruled that, for urban uses outside a UGB, there must be a Goal 14 exception. She alleged there is a conflict between the DCC and the DCCP and notes that urban uses are not defined.

The record was left open to allow COWL an opportunity to submit written comments which it did on September 8, 2020, summarized below:

- Statewide planning goals apply to comprehensive plan amendments (ORS 197.835(6))
- Expansion of urban development into rural areas is a matter of public concern (ORS 215.243(3))
- Industrial use is a type of urban use not permitted on rural land without an exception to Goal 14
- The subject property meets the definition of "undeveloped rural land" in OAR 660-014-0040(1)
- The Oregon Supreme Court in *1000 Friends of Oregon v. Land Conservation and Development (Curry County)*, 301 Or. 447, 724 P.2d 268 (1986) limits rural uses to a sparse settlement, a small farm or an acreage homesite; other uses require an exception to Goal 14
- Industrial use is unrelated to rural uses in nature and kind; no number of conditions on size, setbacks, lighting, or similar characteristics can alter the nature of the use
- DCC 18.100 is not a list of rural uses
- DCC 18.100 was acknowledged at a time when the phrase "rural industrial" was Deschutes County's own appellation for a handful of carefully delineated, bounded rural lands where exceptions had been taken and industrial uses predated the land use planning laws; DCC

18.100 was acknowledged when “rural industrial” could only be applied to specific exception areas

- Zoning code requirements do not alter the nature of the use
- Industrial uses inherently conflict with rural uses
- The Applicant is wrong that DCC 18.100.030(J), limitation on industrial uses applies. This is because DCC 18.100.020 conditionally allows pulp and paper manufacturing
- Under DCC 18.100.030(J), the County may not approve any use on the property requiring contaminant discharge permits prior to a review of the contaminant discharges by state or federal agencies, but there are no containment discharge permits in the record
- The requested amendment does not comply with Goal 6; demonstration of compliance cannot await a specific development application as Goal 6 does not apply to specific development applications
- The application is not specific enough to determine if uses are urban; the County cannot determine whether the requested amendments comply with the goals, including Goal 14
- Because no use has been proposed, no conditions of approval designed to guarantee that a given use is not urban in nature can be imposed
- It is impermissible to rely on some other agency’s hypothetical future actions to demonstrate compliance with Goal 6 in the present
- The application is not specific enough to determine if uses are urban; because no use has been proposed, no conditions of approval designed to guarantee that a given use is not urban in nature can be imposed
- Demonstration of compliance with Goal 14 cannot await a specific development application, as Goal 14 does not apply to specific development applications
- The proposal cannot be reviewed and approved without a Goal 14 exception application
- Industrial use is a type of urban use under Goal 14 which states, in relevant part, “Notwithstanding other provisions of this goal restricting urban uses on rural land, a county may authorize industrial development, and accessory uses subordinate to the industrial development, in building of any size and type, on certain lands outside urban growth boundaries specified in ORS 197.713 and 197.714.”
- Industrial use is permitted without an exception to Goal 14 only in discrete, specifically bounded areas (urban areas, unincorporated communities and on lands zoned for industrial prior to 2004)
- OAR 660-014-0040 regulates urban development and provides the rule for locating industrial use on undeveloped rural lands; under this regulation, industrial uses are permitted without an exception only in the areas described in ORS 197.713.
- Without knowing the particular use requested, there is no way to know whether the Applicant has water available for industrial use.

N. NOTICE REQUIREMENT: The Applicant complied with the posted notice requirements of Section 22.24.030(B) of Deschutes County Code (DCC) Title 22. The Applicant submitted a Land Use Action Sign Affidavit, dated August 19, 2020, indicating the Applicant posted notice of the land use action on August 19, 2020.

O. REVIEW PERIOD: The applications for 247-20-000438-PA and 247-20-000439-ZC were submitted to the Planning Division on June 30, 2020. According to Deschutes County Code (DCC) 22.20.040(D), the review of the proposed quasi-judicial plan amendment application is not subject to the 150-day review period for issuance of a final local land use decision under ORS 215.427.

III. CONCLUSIONS OF LAW:

A. CONTEXT FOR DECISION-MAKING BASED ON LUBA AND COURT RULINGS

The Hearings Officer's findings, conclusions and recommendation are based on my independent review of prior decisions issued by LUBA and the Court of Appeals concerning the subject property and DCCP

amendments. My findings, conclusions and recommendation also are based on my independent review of Ordinance 2018-008 and supporting findings.

1. ***Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016), LUBA No. 2016-012, Final Opinion and Order (Remanded August 10, 2016)**

COWL appealed the BOCC's adoption of Ordinances 2016-001 and 2016-002, which changed the DCCP map designation for the subject property from Agriculture to Rural Industrial and changed the zoning from Exclusive Farm Use Tumalo/Bend Subzone (EFU) to Rural Industrial Zone. The challenged decision approved an irrevocably committed exception to Goal 14.

LUBA addressed two assignments of error. The First Assignment of Error addressed OAR 660-033-0020(1), definition of "Agricultural land," as the term is used in Goal 3 (Agricultural Lands). COWL argued that the County erred in determining that the subject property does not qualify as agricultural land. COWL advanced four arguments under the assignment of error: (1) the property's history of irrigated agriculture shows it is agricultural land; (2) there has been no change in the irrigated status of the property; (3) there has been no change in the soils; and (4) the Borine Study, which the county relied on, does not establish that the property is predominantly Class VII and VIII soils.

LUBA declined to re-weigh the evidence and ruled that substantial evidence in the record supported the County's determinations. In denying the First Assignment of Error, LUBA ruled:

- The Borine Study is evidence a reasonable person would rely on and the county was entitled to rely on it. This study supports the county's conclusion that the site is not predominantly Class VI soils (page 11). LUBA rejected COWL's argument that the Borine Study does not establish that the property is predominantly Class VII and VIII soils.
- There is substantial evidence in the record to support the county's determination that irrigating the subject property would have to overcome a number of obstacles and would not likely produce enough in the way of increased production to make such irrigation practical (page 13). LUBA rejected COWL's arguments that (1) the history of irrigation establishes that the subject property qualifies as agricultural land, and (2) the county erroneously found there was been a change in irrigation status following the construction of the overpass.
- "[T]he differences between NRCS and the Borine Study with regard to their conclusions about the classification of the soils on the property is explained by the high nature of the NRCS data and the more detailed nature of the Borine Study. [COWL] assigns far too much significance to the historical use of the 21-acre property when it was part of a much larger farm unit." (page 14). LUBA rejected COWL's argument that could not have been a "radical change" in soils to support a determination that the soil quality on the property dropped from irrigated Class III soils to Class VII and Class VIII.
- The county's findings regarding OAR 660-033-0020(1)(a)(B) (even if land does not qualify as agricultural land under OAR 660-033-0020(1)(a)(A), land may qualify as agricultural land taking into consideration factors including "accepted farming practices") are supported by the record and are sufficient to explain why the county concluded the subject property need not be inventoried as agricultural land (page 16). Specifically, LUBA cited the county's determination that commercial agricultural uses in the vicinity are limited, and found that it is not an accepted farm practice to irrigate and cultivate Class VII and VIII soils.
- COWL has not shown the county erred in determining the property does not qualify as agricultural land under OAR 660-033-0020(1)(b) (lands "adjacent to or intermingled with land in capability classes... I-VI within a farm unit") (page 18). Specifically, LUBA agreed with the county's determination that the property is comparatively small for eastern Oregon, there is a major highway bisecting the property that makes it much more difficult to put to farm use, the property never contributed significantly to any of the larger farming operations it was part of in

the past, and the subject property is not adjacent to or intermingled with any property that currently constitutes a farm unit.

The Second Assignment of Error addressed the argument that the County erred by approving an irrevocably committed exception to Goal 14 for the subject property. LUBA sustained that assignment of error and remanded the County's decision. A summary of LUBA's ruling on the Second Assignment of Error is as follows:

- COWL did not waive its right to raise Goal 14 issues on appeal to LUBA (page 20).
- OAR 660-014-0030(3) sets out four factors that must be considered in granting an irrevocably committed exception to Goal 14. OAR 660-014-0030(4) makes it clear that an irrevocably committed exception to Goal 14 must be based on all four factors and there must be a statement of reasons explaining why the facts found in addressing the factors support a conclusion that the land is committed to urban rather than rural development (pages 21-22)
- The county adopted findings addressing all of the OAR 660-014-0030(3) factors, but the explanation for why the facts the county found support a conclusion that the property is committed to urban use, per OAR 660-014-0030(4), is missing (page 22). LUBA continued, "That the required explanation for why the property is irrevocably committed to urban uses is entirely missing is hardly surprising. The subject property is located in the vicinity of farm and rural non-farm uses and is bordered by Highway 97 and divided by Tumalo Road. In the abstract it is difficult to see how being surrounded by rural uses and roadways could ever irrevocably commit rural land to urban uses, since that requires a finding that 'all rural uses, are impracticable.'" (page 23).
- "To approve a committed exception to Goal 14 to allow urban uses of the property (because all rural uses are impracticable) and then apply a zoning district that was adopted to limit industrial uses to rural industrial uses would appear on its face to be inconsistent." (page 23).
- The only reason for approving a Goal 14 exception is to authorize urban uses of rural land. "The approved exception, had it been affirmed on appeal, would make it irrelevant whether the RI zone allows urban uses." (page 27).
- "The challenged decision only changes the plan and zoning map designations for the property; it does not approve any specific uses on the property. Once any potentially urban uses of concern that might be allowed in the RI zone have been identified, conditions of approval could be imposed to either preclude such urban uses or require approval of a Goal 14 exception in the future before such uses could be addressed in the future. Or if the applicant plans to seek approval for such uses, a more limited "reasons" exception to authorize just those potentially urban uses would seem to offer a far better chance for success than an irrevocably committed exception." (page 28).

The Hearings Officer finds that parties are bound by the law of the case with respect to LUBA's upholding of the County's determination that the subject property does not constitute Agricultural Lands under OAR 660-033-0020(1). The law of the case doctrine "is a general principle of law ... that when a ruling or decision has been once made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review." *Gould v. Deschutes County*, 272 Or.App. 666, 362 P.3d 679 (2015) (quoting *Boise Cascade Corp. v. Board of Forestry*, 216 Or.App. 338, 351, 174 P.3d 587 (2007), *rev den*, 344 Or. 390, 181 P.3d 769 (2008)). The doctrine is "essentially one of judicial economy and judicial discretion." *State v. Metz*, 162 Or.App. 448, 454, 986 P.2d 714 (1999), *rev den*, 330 Or. 331, 6 P.3d 1101 (2000). The doctrine applies to issues decided by LUBA, as well those issues decided by reviewing appellate courts, and prohibits a municipality from revisiting such issues and resolving them differently in later phases of a case. *Gould*, 272 Or.App. at 673.

The Hearings Officer finds that COWL has not presented any new evidence that warrants a different determination from that previously made by the County in file nos. 247-14-000456-ZC and 247-14-000457-PA and upheld by LUBA in *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016). COWL has presented the same arguments regarding agricultural land/Goal 3, which arguments are based on the same allegations that were considered and rejected by LUBA.

COWL did not appeal LUBA's ruling denying its assignment of error regarding agricultural lands. COWL cannot collaterally attack that portion of LUBA's decision regarding agricultural lands on the subject property, which constitutes the law of the case. The Hearings Officer rejects COWL's arguments regarding agricultural lands as having been conclusively decided by LUBA.

The Hearings Officer finds that LUBA's ruling concerning Goal 14 is three-part as follows. First, LUBA ruled that the County erred in approving a Goal 14 "irrevocably committed" exception because there was not a sufficient "statement of reasons" explaining why the property is committed to urban uses and urban level of development. Because the County's reasoning was missing to support a "committed" exception, remand was required. Second, LUBA determined that, if the hearings officer reasoned that the RI zone only authorizes rural uses, such reasoning was not stated with adequate clarity. Moreover, LUBA observed that if the Goal 14 exception had been affirmed on appeal, it would make it irrelevant whether the RI zone allows urban uses. Finally, LUBA determined that the application approved only a change in the plan and zoning map designations for the property; it does not approve any specific uses on the property.

LUBA did not rule that no exception to Goal 14 is needed for Rural Industrial uses that are permitted outright by DCC 18.100.010 and/or for conditional uses allowed under DCC 18.100.020. LUBA did not remand the decision to the County to remove the exception to Goal 14, but sustained COWL's assignment of error that the Goal 14 exception was unsupported by law. LUBA did not rule that an exception to Goal 14 was unattainable.

2. *Central Oregon Landwatch v. Deschutes County*, 75 Or LUBA 441, aff'd, 288 Or App 378, 405 P3d 197 (2017), LUBA No. 2017-009, Final Opinion and Order (Reversed June 15, 2017)

On remand from LUBA, *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016), the BOCC adopted Ordinances 2016-072, 2016-028, 2016-029 and 2016-030, which: (1) repealed the portion of Ordinances 2016-001 and 2016-002 that approved an exception to Goal 14 and (2) changed the DCCP map designation for the subject property from Agriculture to Rural Industrial and changed the zoning from Exclusive Farm Use Tumalo/Bend Subzone (EFU) to Rural Industrial Zone. COWL appealed the ordinances. The County supported its decision with findings that the map amendments do not authorize urban uses and therefore do not require an exception to Goal 14.

Although COWL raised several assignments of error, LUBA's resolution of the First Assignment of Error was dispositive. LUBA did not reach the other assignments of error, but noted in a footnote that COWL had argued that, without an exception to Goal 14, all new industrial development is limited to urban growth boundaries, unincorporated communities, and the circumstances set out in ORS 197.713 and 197.714 for certain lands that were "planned and zoned for industrial use on January 1, 2004." Page 5, n.2. On page 7, note 4, LUBA commented:

A significant area of disagreement between petitioner and the county is whether the RI zone actually limits the industrial uses allowed in the RI zone so that they are less intensive than the uses allowed in unincorporated communities under OAR chapter 660, division 22 and will not constitute "urban uses" that are generally prohibited on rural land by Goal 14. We need not and do not attempt to resolve that disagreement in this opinion.

LUBA ruled in dicta on page 9, note 6 of its decision that, "Assuming the Rural Industrial plan designation and RI zone do so [limit industrial uses to those that are rural in nature], an exception to Goal 14 would be unnecessary."

The Assignment of Error addressed by LUBA is whether the Rural Industrial DCCP map designation and corresponding RI zoning designation is limited to certain existing exception areas that are identified in the DCCP. COWL argued that the subject property cannot be designated RI because it is not included in one of three acknowledged exception areas. The County had adopted findings to reject that argument and interpreted DCCP Section 3.4 to permit the County to apply the RI plan designation to any property, as long as it is located outside urban growth boundaries and outside designated unincorporated communities and either (1) does not qualify as forest land or (2) is the subject of an exception to Goal 3 (Agricultural Lands) or Goal 4 (Forest Lands). COWL attempted to invoke Goal 14 in its argument, but LUBA rejected the broad argument that "all industrial development is urban in nature and requires a Goal 14 exception unless located within an urban growth boundary or a designated unincorporated community." (Page 12).

LUBA reversed the County's decision, upholding the First Assignment of Error, and ruled:

[T]he county's interpretation [of DCCP Section 3.4] cannot be affirmed if it is '[i]nconsistent with the express language of the comprehensive plan ...' For the reasons explained below, the county's interpretation of DCCP Section 3.4 '[i]s inconsistent with the express language' of DCCP Section 3.4 which was quoted earlier. Given that DCCP language, the county's broad interpretation of DCCP Section 3.4 to permit the Rural Industrial designation to be applied to any rural lands outside an urban growth boundary or unincorporated community, as long as that rural land is not agricultural or forest land, is implausible and not affirmable under ORS 197.829(1)(a).

It is the county's interpretation, not petitioner's interpretation, which fails to give meaning to the only DCCP language that actually addresses what properties are eligible for the Rural Commercial and Rural Industrial plan designation. Petitioner emphasized the underscored language in the DCCP language quoted above. See n.10. It may be that language does not expressly foreclose the possibility that the county might be able to identify additional areas that are built or committed to rural industrial development, take an exception to the applicable resource goals, if any, and add those areas to DCCP Section 3.4. However, unless and until that happens it is inconsistent with that DCCP language for the county to apply the Rural Industrial plan designation to sites other than the three identified exception areas.

We agree with the county that the Rural Industrial plan designation is not limited to incorporated communities, and in fact we do not understand petitioner to argue that the Rural Industrial plan designation is appropriately applied within unincorporated communities. Although we need not resolve the issue, we also tend to agree with the county that the Rural Industrial designation is not necessarily limited to the three exception areas listed in DCCP Section 3.4, provided the county first amends DCCP Section 3.4 to remove language that limits application of the Rural Industrial designation to the three identifies sites, or expressly broadens application of the Rural Industrial designation to other sites deemed to be eligible under DCC [sic] Section 3.4 for the Rural Industrial plan designation. But as the DCCP Section 3.4 language quoted earlier makes clear, the Rural Industrial designation is a limited purpose map designation, in the sense it is a plan designation that was expressly applied only to three identified areas that had already been built or committed to rural industrial development, and nothing in DCCP Section 3.4 purports to authorize its application to other properties in other circumstances.

Pages 12-15 (footnotes omitted). LUBA reversed the decision on the basis that "the geographically limited DCCP Section 3.4 authorization for the Rural Industrial plan designation does not include the subject property." Therefore, the County's decision to apply the Rural Industrial designation to the

subject property "violates a provision of applicable law and is prohibited as a matter of law." Page 16 (citing OAR 661-010-0071(1)(c)). LUBA did not rule on the propriety of the County's findings that a Goal 14 exception is not required to rezone and re-designate the subject property to RI.

The County appealed LUBA's Final Opinion and Order to the Oregon Court of Appeals, which affirmed LUBA in *Central Oregon Landwatch v. Deschutes County*, 288 Or App 378, 405 P3d 197 (2017). The County then adopted Ordinance No. 2018-008 to amend the text of the DCCP to remove language that limited application of the Rural Industrial (RI) and Rural Commercial (RC) plan designations to specific areas described in the DCCP.

3. *Central Oregon Landwatch v. Deschutes County*, LUBA No. 2018-126, Final Opinion and Order (Affirmed March 20, 2019)

COWL appealed the County's adoption of Ordinance No. 2018-008 that amended the text of the DCCP to remove limiting language that LUBA and the Court of Appeals found prohibited application of the Rural Industrial (RI) and/or the Rural Commercial (RC) plan designations to those specific areas described in the DCCP. The Ordinance does not approve re-designation of the subject property, which is the subject of the current application.

As stated on page 5 of LUBA's Final Opinion and Order, in relevant part:

Because the three areas listed in prior DCCP 3.4 were the only areas in the county that were subject to the RI plan designation, the effect of the plan amendments is to allow the county to potentially approve an application to change the comprehensive plan designation for any property in the county to RI, provided the application is consistent with all applicable statutes, rules, the provisions of the DCCP, and the provisions of the Deschutes County Code (DCC) governing plan amendments.

LUBA stated that it understood COWL's arguments with respect to Assignments of Error One and Two to be: (a) that the County's decision fails to comply with Goal 14 because the amendments will allow urban uses on rural land, that the findings the County adopted to demonstrate compliance with Goal 14 are inadequate and that unamended provisions of DCC 18.100.010 allow urban uses on rural lands in contravention of Goal 14; (b) that the County's findings are inadequate to demonstrate compliance with OAR 660-014-0040(3)(a); (c) that the County's findings regarding compliance with Goals 3, 5, 6, 7, 8, 10, 11 and 13 are inadequate and improperly defer a finding of compliance with those goals to a future proceeding in which the RI or RC plan designation is applied to property; and (d) that the County failed to demonstrate compliance with OAR 660-004-0018.

LUBA made the following findings, summarized as follows:

- The County correctly found that the challenged text amendments do not allow any urban uses on rural land because the amendments do not apply the RI plan designation to any property, but merely expand the allowable locations in the county that could be the subject of an application to change the plan designation to RI (Page 12).
- COWL's arguments that DCC 18.100.010 allows urban uses are an impermissible collateral attack on an acknowledged land use regulation (Page 12).
- OAR 660-014-0030(3)(a) applies only when an irrevocably committed exception is sought to establish urban development on rural land, and because the amendments do not approve an exception, the rule does not apply (Page 13).
- Goal 3 is not implicated by the County's decision because no land is re-designated or re-zoned by the amendments (Pages 13-14).
- Because the decision only amends the text of the DCCP, but does not apply the RI or RC plan designations to any property, Goals 5, 6, 7, 8, 10, 11 and 13 are not implicated (Page 14).

- OAR 660-004-0018 (requirements for adoption of plan and zone designations for exception areas) does not apply (Pages 14-15).

With respect to Assignment of Error Three, LUBA rejected COWL's argument that the RI plan designation is a limited designation that the County may only apply to exception areas that were in existence and designated RI when the DCCP was first acknowledged (Page 15).

With respect to Assignment of Error Four, LUBA rejected COWL's argument that the County's decision fails to satisfy the standards for an exception at ORS 197.732, stating "the county's decision does not take an exception to any statewide planning goals." (Pages 15-16).

With respect to Assignment of Error Five, LUBA rejected COWL's argument that the County failed to comply with the requirements for a reasons exception at OAR 660-004-0022 and that the County was required in this decision to adopt a reasons exception to Goal 3. LUBA observed that the amendments do not apply the RI or RC plan designation to any property and thus, the County was not required to adopt a reasons exception to Goal 3 (Page 16).

With respect to Assignment of Error Six, LUBA rejected COWL's argument that the amendments to the DCCP are inconsistent with DCCP 5.2 and that the County failed to establish a need for additional rural industrial or rural commercial uses (Pages 16-17).

The Oregon Court of Appeals affirmed without opinion LUBA's Final Opinion and Order, effective August 5, 2019, upholding Ordinance 2018-008.

The Hearings Officer interprets this decision to rule that Goal 14 and Goal 3 exceptions were not required, and the County did not have to consider Goals 5, 6, 7, 8, 10, 11 and 13 in the context of the County's adoption of Ordinance No. 2018-008 because the amended text did not result in the re-designation of any specific property to RI or RC. Therefore, the Hearings Officer must consider whether a Goal 14 exception is required for the subject application and must consider and address consistency with other applicable Goals. As discussed above, the law of the case is that Goal 3 is not applicable to the proposed re-designation of the subject property because it does not constitute Agricultural Land. *E.g., Gould*, 272 Or.App. at 673. I find that no exception to Goal 3 is required.

4. Ordinance No. 2018-008

The BOCC adopted Ordinance No. 2018-008 on September 26, 2018, effective October 26, 2018, amending DCC Title 23.01.010, Introduction, DCCP Chapter 3, Rural Growth Management, and DCCP Chapter 5.12, Supplementary Section – Legislative History. The Deschutes County Community Development Department initiated the amendments via File No. 247-18-000404-PA to allow for the potential of new properties to be designated as Rural Industrial or Rural Commercial. Following a duly noticed public hearing on August 20, 2018, the BOCC concluded that the public will benefit from the proposed changes to the DCCP and DCC. Ordinance No. 2018-008 does not apply to any specific property and does not effectuate a re-designation and rezone of the subject property.

As noted above, COWL appealed the County's decision to LUBA which denied the appeal. LUBA's decision was upheld by the Oregon Court of Appeals.

Section 3.4 of the DCCP, Rural Economy, was amended at page 3 with respect to Rural Commercial and Rural Industrial, adding language that, among other things, states, "[i]t may be in the best interest of the County to provide opportunities for the establishment of new Rural Industrial and Rural Commercial properties, when they are appropriate and regulations are met. Requests to re-designate property as Rural Commercial or Rural Industrial will be reviewed on a property-specific basis in accordance with state and local regulations." The section on Rural Industrial on pages 4-5 was amended to state, among other things, that:

The county may apply the Rural Industrial plan designation to specific property within existing Rural Industrial exception areas, or to any other specific property that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, this Comprehensive Plan and the Deschutes County Development Code, and that is located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation and zoning brings these areas and specific properties into compliance with state rules by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.

The section on Future of Deschutes County Economy on page 5 states, among other things:

From a rural perspective, working with the agriculture and forest sectors to encourage new uses as discussed in those sections of this Plan is an option to supplement the otherwise minimal growth expected in rural commercial and rural industrial areas.

Section 3.4 Rural Economy Policies, specifically Policy 3.4.9 (Rural Commercial designated lands), was amended, and a new Policy 2.4.36 was added, which states:

Properties for which a property owner has demonstrated that Goals 3 and 4 do not apply may be considered for Rural Industrial designation, as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan. Rural Industrial zoning shall be applied to a new property that is approved for the Rural Industrial plan designation.

Ordinance No. 2018-008 was supported by Findings, attached as Exhibit D to the ordinance. Among other things, the Findings state:

1. LUBA No. 2016-012 sustained the County's determination that the Aceti property was not resource land, but remanded a Goal 14 exception approval, "with instructions that the exception was necessary only if the County wished to approve urban uses on rural land."
2. Following the decision in LUBA No. 2017-009, in which LUBA reversed the County's approval of a comprehensive plan designation change and zone change for the Aceti property because it was inconsistent with the express language of the DCCP which did not allow approval of the Rural Industrial plan designation for properties outside the three listed exception areas, the Court of Appeals upheld LUBA's decision.
3. "Consequently, legislative amendments to the DCCP are needed to grant the County the authority it believed it had, authority that every other County in Oregon has, when it interpreted the DCCP. The proposed amendment language will need to address, at the minimum, the language the Court of Appeals concluded limited the application of the Rural Industrial plan designation."
4. "The purpose for the proposed amendments to the DCCP is to plainly and unequivocally establish that Deschutes County has the authority to approve, throughout the county, an application for a comprehensive plan designation change for a specific property to Rural Commercial or Rural Industrial so long as the plan designation change is consistent with the Oregon Revised Statutes ("ORS"), Oregon Administrative Rules ("OAR"), the DCCP and the Deschutes County Code. Following approval of the proposed amendments, the County's authority to approve such comprehensive plan designation changes will not be limited to the existing exception areas currently defined in the DCCP."
5. "The proposed amendments do not change the plan designation of any property within Deschutes County, or otherwise authorize any development or land use changes in the county."
6. The proposed DCCP amendments were submitted to LCDC in the manner prescribed by ORS 197.610.

7. The amendments help provide for the provision of adequate opportunities for economic development in the County as provided by ORS 197.712(1). "LCDC has acknowledged the DCCP as consistent with the requirements of subsection 2(a) through (d) [of ORS 197.712] and the proposed amendments do not change or otherwise affect those provisions. These amendments will provide a reasonable opportunity to satisfy arising needs for commercial or industrial development on rural lands consistent with conservation of the state's agricultural and forest land base as identified in ORS 197.712(2)(g)(A) by requiring that any proposal for the Rural Commercial or Rural Industrial plan designation in rural areas of the county demonstrate why the resource goals do not or should not apply to the property."
8. "The proposed amendments most directly concern Goal 9. While the DCCP contains policies intended to contribute to a stable and healthy economy in the county and LCDC acknowledged the plan as consistent with Goal 9's planning and implementation guidelines, the recent LUBA and Court of Appeals decision eliminated one of the primary implementation measures that the County previously believed it had. As a result of those decisions the County lost the 'land use control' implementation measure of having the authority to approve comprehensive plan designation changes to Rural Industrial for properties outside the existing exception areas when approval of a requested change was otherwise allowed by ORS, OAR, the DCCP."
9. "[T]he DCCP expresses the County's intention to pursue the full range of economic opportunities that are available to the County so long as such activity would continue to maintain the integrity of the County's rural character and natural environment."
10. "The purpose of Goal 14 is to direct urban uses to areas inside urban growth boundaries. The proposed amendment is consistent with Goal 14 because not only must any application for Rural Commercial or Rural Industrial plan designation demonstrate it is consistent with Goal 14, but, as DCCP Policy 3.4.9 and Policy 3.4.23 direct, land use regulations for the Rural Commercial and Rural Industrial zones ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660 Division 22, and are consequently not urban uses."
11. "Agricultural Land Goal 1 [in the DCCP] recognizes the importance of preserving agricultural lands and of supporting the agricultural industry in the county. However, Policies 2.2.3 and 2.2.4 recognize, as does the discussion in the introduction, that there are properties in the county where land that is designated for agricultural use is not suitable for or necessary to support agriculture."
12. "Furthermore, existing Policies 3.4.12 and 3.4.27 provide that land use regulations shall ensure that new uses authorized within Rural Commercial and Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area. Implementing regulations for those policies have been incorporated into DCC Title 18."
13. "The introductory statement for DCCP Section 3.2 Rural Development recognizes the potential for limited economic development in rural areas of the county. The statement notes that state law greatly restricts rural commercial and rural industrial uses in rural areas, so consequently the economic growth in those areas is not anticipated to be significant. DCCP Chapter 3, p. 3."
14. "Each of those passages [in DCCP Section 3.2 Rural Development] express the County's intent to pursue the full range of economic opportunities available, while at the same time recognizing that Oregon's statewide land use planning program imposes severe limitations on the types and intensity of economic activity that can occur on rural land. While the expectation is that future rural commercial and industrial growth in the county will be extremely limited, those provisions leave little doubt that the County wishes to pursue whatever opportunities exist to promote rural economic development."
15. "The proposed amendments also do nothing that allows urban uses on rural land, thereby implementing Policies 3.4.9 and 3.4.23. The application of DCC Title 18 to any development proposed on Rural Commercial or Rural Industrial designated land will ensure that the development approved is

consistent with the requirements set forth under Policies 3.4.12 and 3.4.27 to not adversely affect surrounding area agricultural or forest land, or the development policies limiting building size (Policies 3.4.14; 3.4.30), sewers (Policies 3.4.18; 3.4.31 and .35), and water (Policies 3.4.19; 3.4.31) intended to limit the scope and intensity of development on rural land.”

5. Other LUBA Decisions Concerning Goal 14

The Applicant’s attorney, Bill Kloos, included analysis and attached copies of LUBA decisions regarding the question of whether a Goal 14 exception is required. In his September 15, 2020 letter, Mr. Kloos quoted *Shaffer v. Jackson County*, 17 Or LUBA 922, 931 and n. 5 (1989):

[W]e have consistently taken the position that, in the absence of interpretative rules or goal amendments adopted by LCDC, whether a residential, commercial, industrial or other type of use is “urban” or “rural” requires a case by case determination, based on relevant factors identified in various opinions by this Board and the courts. . . . Thus, we do not agree with the petitioner that an industrial use is per se an urban use. (footnote omitted).

In *Shaffer*, LUBA considered an appeal after remand involving a county decision to approve a map amendment requested for a specific use: an asphalt batch plant. LUBA had originally remanded the decision in *Shaffer v. Jackson County*, 16 Or LUBA 871 (871) because the county had not determined whether the proposed asphalt batch plant is an urban or rural use. As stated on page 931-32:

The additional factor claimed by petitioner to be determinative of urban use status, i.e., not being limited to serving the needs and requirements of the rural area, is derived solely from our opinions concerning the urban/rural nature of commercial uses. This factor might be significant, or even determinative, in deciding whether a commercial use is urban or rural. However, this factor need not have the same relevance with regard to other types of uses. We agree with intervenors that if this factor were determinative for all types of uses, most farm uses would be urban. With regard to industrial uses, we find the fact that the product of an industrial use will be used in urban areas is relevant to a determination of whether that industrial use is urban, but it is not conclusive. (footnote omitted).

LUBA revisited the issue in *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014). In that case, LUBA reviewed an appeal of a county’s approval of an application for comprehensive plan amendment and zone change, submitted for the purpose of allowing an expansion of a rural industrial park to accommodate “future maritime and large lot industrial users that will benefit from the moorage and deep-water access [of Port Woodward], existing services, energy generation facilities and rail/highway/water transportation facilities.” The applicant did not propose any specific industrial uses for approval through the reasons exception process; an exception to Goal 3 was requested. LUBA agreed with the Port that nothing in OAR chapter 660, division 004 or elsewhere requires the county to identify a specific proposed use, or precludes the county from identifying a relatively wide range of industrial uses as the proposed “use” for purposes of applying the reasons exception criteria.

LUBA reiterated its holding in *Shaffer* that industrial uses are not inherently urban in nature. The following factors must be considered in determining whether a proposed rural industrial use is rural or urban, which ask whether the industrial use:

1. Employs a small number of workers;
2. Is significantly dependent on a site-specific resource and there is a practical necessity to site the use near the resource;
3. Is a type of use typically located in rural areas; and
4. Does not require public facilities or services.

None of these factors are conclusive in isolation, but must be considered together. If each of these factors is answered in the affirmative, then it may be concluded, without more, that the proposed

industrial use is rural in nature. However, if at least one factor is answered in the negative, then further analysis or steps are necessary. The county then must do one of the following three things:

1. Limit the allowed uses to effectively prevent urban use of rural land;
2. Take an exception to Goal 14; or
3. Adequately explain why the proposed use, notwithstanding the presence of one or more factors pointing toward an urban nature, should be viewed as a rural use.

As LUBA ruled in *Columbia Riverkeeper*, the County must expressly consider the factors listed in *Shaffer* and offer more than a "bare conclusion" that the proposed plan amendment authorizes no urban uses. The Hearings Officer analyzes each of the *Shaffer* factors in the Ruling on Goal 14 Exception section below.

6. Staff Memorandum to Hearings Officer on Goal 14 Issues

Staff prepared and submitted to the record a Memorandum to the Hearings Officer, dated September 2, 2020, detailing the history associated with the Applicant's prior request for plan amendment and zone change and identifying contrasting arguments of the Applicant and COWL with respect to the subject application. This Memorandum states, in relevant part:

The county approved a request for plan amendment and zone change (file nos. 247-14-000456-ZC/457-PA) for the subject property to redesignate and rezone it to Rural Industrial. This decision was appealed by Central Oregon LandWatch to the Oregon Land Use Board of Appeals (LUBA). In the decision (LUBA No. 2016-012), LUBA remanded the county's decision sustaining the petitioner's assignment of error that challenged the adequacy of the county's Statewide Planning Goal 14 (Urbanization) exception concluding that the county failed to provide the required explanation for why the subject property is irrevocably committed to urban uses and remanded the decision.

On remand (file no. 247-16-000593-A), the applicant did not include an exception to Goal 14 in the plan amendment request. The county again approved the comprehensive plan and zoning map amendments finding that the challenged map amendments do not authorize urban uses and therefore do not require an exception to Goal 14. That decision was appealed to LUBA by Central Oregon LandWatch. In the subsequent decision (LUBA No. 2017-009), LUBA acknowledged the petitioner suggested the county's interpretation of Deschutes County Comprehensive Plan Section 3.4 is inconsistent with Goal 14 based on the argument that all industrial development is urban in nature and, therefore, requires a Goal 14 exception unless located within an urban growth boundary or a designated unincorporated community. LUBA rejected that broad argument without further analysis.

POSITIONS ON CURRENT PROPOSAL

Applicant

In summary, the applicant argues an exception to Goal 14 is not required because the Rural Industrial comprehensive plan designation is applicable to areas outside of urban growth boundaries and unincorporated communities. The applicant further argues the proposal is not likely to result in the urbanization of the subject site by allowing development with Rural Industrial zone uses and the applicable development standards of the zone will result in appropriate and compatible low density development and not an urban level density.

Central Oregon LandWatch

In summary, Central Oregon LandWatch again argues an exception to Goal 14 is required to permit all new industrial development outside of urban growth boundaries, unincorporated communities and as otherwise authorized by Oregon Revised Statute. As such, COWL contends the proposed plan amendment and zone change requires approval of an exception to Goal 14 and cannot be approved as proposed.

Staff requests the Hearings Officer determine: (1) will the proposed plan amendment and zone change result in the potential for urban uses; and (2) does the proposed plan amendment require an exception to Goal 14? The Hearings Officer addresses the arguments of the Applicant and COWL below.

B. RULING ON APPLICABILITY OF GOAL 14 EXCEPTION

In general, Goal 14 compliance issues raised by a post-acknowledgement plan amendment must be addressed and resolved at the time the plan amendment is adopted. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 160, 169 (2004). In that case, LUBA did not foreclose the possibility, but questioned whether a goal compliance issue raised by the plan and zoning amendment could be “deferred” to a subsequent development approval under the zoning scheme adopted in the amendment decision. *Columbia Riverkeeper v. Columbia County*, 70 Or LUBA 171 (2014). The Hearings Officer finds that I need not reach this issue in my ruling on applicability of a Goal 14 exception, nor in my ruling on Goal 14 compliance.

The Hearings Officer finds that the Applicant is incorrect in his argument that LUBA remanded the matter to the County in LUBA No. 2016-012 with directions to remove the exception to Goal 14 from the approval of the Applicant’s application for re-designation and rezoning of the subject property. I find that the BOCC’s finding in support of Ordinance 2018-008, that LUBA remanded the original re-designation and rezone approval “with instructions that the exception was necessary only if the County wished to approve urban uses on rural land,” is correct. As LUBA stated in LUBA No. 2017-009:

Assuming that the Rural Industrial plan designation and RI zone do so [limit industrial uses to those that are rural in nature], an exception to Goal 14 would be unnecessary.

(emphasis added). Under LUBA No. 2016-012 and LUBA No. 2017-009, no Goal 14 exception is required if the only uses that may be permitted under DCC Chapter 18.100 are rural industrial uses. The Applicant submits that he does not desire to permit urban uses on the property in the future and that the policies of the DCCP, implemented by DCC Chapter 18.100, which is an acknowledged land use regulation, do not allow urban uses on RI designated and zoned land. Specific findings with “reasonable clarity” must be made to support a determination that the zoning code and comprehensive plan limit industrial uses to those that are rural in nature. Of significance, however, LUBA has already rejected the assertion that DCC 18.100.010 allows urban uses:

Respondents also respond that petitioner’s arguments that DCC 18.100.010 allows urban uses are an impermissible collateral attack on an acknowledged land use regulation. We agree. No provisions of the DCC were amended by the challenged decision and accordingly, an appeal of amendments to the DCCP is not the appropriate place to challenge those acknowledged DCC provisions.

LUBA No. 2018-126 at p. 12 (emphasis added). The Hearings Officer is bound by this ruling and must reject COWL’s arguments regarding the timing and alleged reasoning for the acknowledgement of DCC 18.100. Moreover, COWL’s speculation as to what the County had in mind when it adopted DCC 18.100 cannot be considered as substantial evidence, even if the issue was properly before me, which it is not. See, e.g., *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997) (unsupported statements and assumptions by persons testifying at a hearing concerning the challenged decision do not constitute substantial evidence); see also *Reeves v. Washington County*, 24 Or LUBA 483 (1993) (defining “substantial evidence”).

COWL's argument that all industrial uses are *per se* urban uses has been consistently rejected by LUBA and reviewing courts. In LUBA No. 2017-009 and LUBA No. 2018-126, LUBA rejected the broad argument that "all industrial development is urban in nature and requires a Goal 14 exception unless located within an urban growth boundary or a designated unincorporated community." These rulings are binding on the parties as the law of the case. *E.g., Gould*, 272 Or.App. at 673. The Hearings Officer thus rejects COWL's repeated arguments on this issue.³ Specifically, I reject the arguments that: (1) the only rural uses allowed without an exception to Goal 14 are a sparse settlement, a small farm or an acreage homesite; (2) "without an exception to Goal 14, all new industrial development is limited to urban growth boundaries, unincorporated communities, and the circumstances set out in ORS 197.713 and 197.714 for certain lands that were "planned and zoned for industrial use on January 1, 2004"; (3) industrial uses are fundamentally incompatible and inherently conflict with other rural uses, regardless of conditions; and (4) zoning code requirements do not alter the nature of the use. The Hearings Officer also rejects COWL's argument that there is no "need" for additional rural industrial or rural commercial land, under the law of the case doctrine.

The Hearings Officer reads the decision in LUBA No. 2016-012 to be based on LUBA's ruling in *Shaffer v. Jackson County*, 17 Or LUBA 922, 931 (1989). As discussed above, *Shaffer* involved a decision that rezoned resource land to rural industrial to allow a specific use, development of an asphalt batch plant. LUBA set forth four factors to be considered together in determining whether a specific proposed use is urban or rural in nature. If each of the four factors is answered in the affirmative, it is relatively straightforward to conclude, without more, that the proposed industrial use is rural in nature. If one of the four factors is answered in the negative, however, the county would either have to limit allowed uses to effectively prevent urban use of rural land, take an exception to Goal 14, or adequately explain why the proposed use, notwithstanding the presence of one or more factors pointing toward an urban use, should be viewed as a rural use.

Here, the Applicant is not proposing any specific use associated with the request to re-designate and rezone the subject property, but has provided has provided a "worst case" development scenario. The Hearings Officer finds that such fact is not uncommon, nor does it impermissibly require the County to defer findings of consistency with Statewide Planning Goals to a future date when a specific development application is submitted and reviewed. The Hearings Officer rejects COWL's argument that the application is not detailed enough to determine if potential, future uses on the property will be urban. The Hearings Officer finds I must assume that any of the suite of outright and conditional use in the RI zone could be developed on the property, subject to the requirements of that zone, site plan review (DCC Chapter 18.124), and conditional use criteria (DCC Chapter 18.128) where applicable.

The Applicant's attorney, Mr. Kloos argues that the County's RI zoning limits the types of uses to those typically located in rural areas and that typically employ a small number of workers. Moreover, he submits that the DCC prohibits uses that require public facilities and services typical of urban uses in the RI zone.⁴ Mr. Kloos did not address whether the use is "significantly dependent on a site-specific

³ COWL argues that all industrial uses are "unrelated to rural uses in nature and kind," and are "not the kind of use that is intended for rural lands." September 8, 2020 letter at pp. 3, 5. COWL also argues that "conditions on size, setbacks, lighting or similar characteristics" cannot alter the nature of industrial uses in the RI zone, stating that such conditions do not "alter the nature of the use or the conflicts with rural uses inherent in industrial uses. *Id.* at pp. 3-4. COWL also advances the same argument rejected by LUBA that the language of Goal 14 can only be construed to mean that industrial development is a type of urban use. *Id.* at pp. 9-10. The Hearings Officer rejects these arguments as contrary to the law of the case.

⁴ Mr. Kloos argues that COWL's reliance on ORS 197.713 is misplaced because its provisions are directed to urban levels of industrial uses on rural land, not on rural levels of rural industrial uses on rural land. He posits that ORS 197.713 applies only to approvals of urban levels of industrial uses on rural lands. Hence the phrase "in buildings of any size and type" language suggests large, urban levels of development and restrictions on the location of urban uses within three miles of a UGB prevents unfair competition with urban industrial uses within cities.

resource and there is a practical necessity to site the use near the resource." In *Shaffer*, LUBA found that the argument the proposed use would have a "significant comparative advantage" is not a relevant factor to be used to determine whether the proposed use is rural rather than urban. 17 Or LUBA at 944.

Reviewing the four factors that must be considered in determining whether a proposed rural industrial use is rural or urban, the Hearings Officer finds that substantial evidence in the record supports a finding that two of the four factors are satisfied in that the potential uses: (a) would employ a small number of workers; and (b) do not require public facilities or services. I find there is not substantial evidence to support an affirmative finding of the other two factors that the potential uses are: (a) significantly dependent on a site-specific resource and there is a practical necessity to site the use near the resource; and (b) are a type of use typically located in rural areas. Therefore, the County must do one of the following:

- Limit the allowed uses to effectively prevent urban use of rural land
- Take an exception to Goal 14; or
- Adequately explain why the proposed use, notwithstanding the presence of one or more factors pointing toward an urban nature, should be viewed as a rural use.

The Applicant has not requested an exception to Goal 14 and is not proposing any specific use of the subject property. Thus, the Hearings Officer must determine that the allowed uses are limited to effectively prevent urban use of rural land in order to recommend approval of the application without a Goal 14 exception. The Hearings Officer finds this standard is satisfied for the following reasons.

First, LUBA has rejected the argument that DCC 18.100.010 allows urban uses as constituting an impermissible collateral attack on an acknowledged land use regulation. LUBA 2018-126, p. 12.

Second, DCC Chapter 18.100 implements DCCP Policies 3.4.9 and 3.4.23, which together direct land use regulations for the Rural Commercial and Rural Industrial zones to "allow uses less intense than those allowed in unincorporated communities as defined by Oregon Administrative Rule 660-022 or its successor," to "assure that urban uses are not permitted on rural industrial lands." The BOCC adopted this finding in support of Ordinance 2018-126, which was appealed and sustained by LUBA and the Court of Appeals.

Third, as the BOCC found in adopting Ordinance 2018-126, which was appealed and sustained by LUBA and the Court of Appeals, the application of DCC Title 18 to any development proposed on Rural Commercial or Rural Industrial designated land will ensure that the development approved is consistent with the requirements set forth in DCCP Policies 3.4.12 and 3.4.27 to not adversely affect surrounding area agricultural or forest land, or the development policies limiting building size (DCCP Policies 3.4.14 and 3.4.28), sewers (DCCP Policies 3.4.18 and 3.4.31) and water (DCCP Policies 3.4.19 and 3.4.32) intended to limit the scope and intensity of development on rural land.

Fourth, DCCP Policy 3.4.28 includes a direction that, for lands designated and zoned RI, new industrial uses shall be limited to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural area, for which there is no floor area per use limitation.

Fifth, DCCP Policy 3.4.31 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.

Sixth, DCCP Policy 3.4.32 includes a direction that, for lands designated and zoned RI, residential and industrial uses shall be served by on-site wells or public water systems.

As the Hearings Officer found in Aceti 1, I find that the state policy embodied in Goal 14 applies and

that the proposed re-designation and rezone (and potential uses allowed outright and conditionally) will ensure more efficient use of the land than under current circumstances, particularly given that the property has not been farmed since construction of the overpass project and is largely in a fallow, undeveloped state. I further find that the proposed rezone will provide for an orderly transition from urban development to rural development, considering the existing transportation "hub" nature of Deschutes Junction, the bisection of the subject property by Tumalo Road and the overpass, which connects the subject property to rural commercial and rural industrial properties to the east of Highway 97, and the other adjacent surrounding commercial and industrial uses.

The Applicant's study of surrounding uses covers the vicinity. I find that the study shows the rezone is compatible with surrounding land uses. This work was done so that it could be confidently determined that the proposed RI zone will be compatible with the surrounding natural resources, built environment and existing uses. It determined that the proposed RI zone will be similar to the commercial and industrial uses and zoning that are assigned to the adjacent properties to the north and east.

For the reasons set forth above, I find that compliance with Use Limitations set forth in DCC 18.100.030, Dimensional Requirements in DCC 18.100.040, Parking and Loading requirements in DCC 18.100.050, Site Plan Review requirements in DCC 18.100.060 and DCC Ch. 18.124, Conditional Use Review under DCC Ch. 18.128 (where required) and Additional Requirements in DCC 18.100.070 will be applied and enforced to ensure compatibility of any proposed RI use with other surrounding uses, including the school property and rural residential development to the west, the EFU-zoned property developed with a single rural residence to the south, and the MUA-10 zoned rural residential properties to the northwest.

The Hearings Officer find that the proposed plan amendment and zone change will not result in the potential for urban uses on the subject property. For the reasons set forth above, the Hearings Officer finds the proposed plan amendment does not require an exception to Goal 14.

C. TITLE 18. DESCHUTES COUNTY ZONING ORDINANCE

Chapter 18.84. Landscape Management Combining Zone

Section 18.84.020. Application of Provisions.

The provisions of this chapter shall apply to all areas within one-fourth mile of roads identified as landscape management corridors in the Comprehensive Plan and the County Zoning Map. The provisions of this chapter shall also apply to all areas within the boundaries of a State scenic waterway or Federal wild and scenic river corridor and all areas within 660 feet of rivers and streams otherwise identified a landscape management corridors in the comprehensive plan and the County Zoning Map. The distance specified above shall be measured horizontally from the centerline of designated landscape management roadways or from the nearest ordinary high water mark of a designated landscape management river or stream. The limitation in this section shall not unduly restrict accepted agricultural practices.

FINDING: US 97 is identified on the County Zoning Map as the landscape management feature. The Hearings Officer finds the location and application of the LM Zone will not be affected by this amendment. Therefore, LM review is not required.

Chapter 18.100. Rural Industrial

FINDING: The Applicant is proposing a map amendment to change the DCCP designation from Agriculture to Rural Industrial and an associated zone change from EFU-TRB to RI. The Applicant is

not at this time requesting approval of any proposed use allowed outright or conditionally in the RI zone. The Hearings Officer finds that future development of the property will be subject to the applicable provisions of DCC Chapter 18.100 if the application is approved by the Board of County Commissioners.

As set forth above, the Hearings Officer finds that I need not review specific uses allowed outright or conditionally in the RI zone to determine that DCC 18.100.010 does not allow urban uses. As LUBA ruled in LUBA 2018-126 at page 12, "petitioner's arguments that DCC 18.100.010 allows urban uses are an impermissible collateral attack on an acknowledged land use regulation. We agree. No provisions of the DCC were amended by the challenged decision and accordingly, an appeal of amendments to the DCCP is not the appropriate place to challenge those acknowledged DCC provisions."

Chapter 18.136. Amendments

Section 18.136.010. Amendments.

DCC Title 18 may be amended as set forth in DCC 18.136. The procedures for text or legislative map changes shall be as set forth in DCC 22.12. A request by a property owner for a quasi-judicial map amendment shall be accomplished by filing an application on forms provided by the Planning Department and shall be subject to applicable procedures of DCC Title 22.

FINDING: The Applicant requests a quasi-judicial map amendment to change the DCCP designation and zone from Agriculture to Rural Industrial. The Applicant filed the appropriate applications for a plan amendment and zone change. The proposal is reviewed under the procedures of DCC Title 22. The Board of County Commissioners has the authority to rezone EFU-TRB zoned land to the RI when the applicable criteria are met. The Hearings Officer finds this criterion is met.

The Hearings Officer notes that, although a pre-application meeting is not required, the Applicant met with Associate Planner Izze Liu and Senior Transportation Planner Peter Russell prior to submission of the application. Applicant's traffic consultant, Joe Bessman, PE, Transight Consulting, LLC met by phone with Mr. Russell several times.

Section 18.136.020. Rezoning Standards.

The applicant for a quasi-judicial rezoning must establish that the public interest is best served by rezoning the property. Factors to be demonstrated by the applicant are:

- A. ***That the change conforms with the Comprehensive Plan, and the change is consistent with the plan's introductory statement and goals.***

FINDING: The Applicant submits that rezoning the subject property to RI will best serve the public interest, that the request is compatible with the surrounding land uses and the character of the vicinity and the proposed new zoning will match the neighboring parcels to the east. The Applicant also submits that the proposed rezoning from EFU-TRB to RI will be consistent with its proposed plan redesignation.

In the matter of 247-19-000648-PA and 247-19-000649-ZC, the BOCC adopted (via Ord. 2019-02) the Hearings Officer's decision that included the following finding to address this criteria:

In previous Hearings Officer's decisions, the Hearings Officers have found that comprehensive plan goals and policies do not constitute mandatory approval criteria for quasi-judicial zone changes. This Hearings Officer agrees. Instead, County goals and policies are implemented through the

zoning ordinance, and thus if the proposed zone change is consistent with the applicable provisions of the zoning ordinance it also will be consistent with the plan.

Nevertheless, some provisions of Deschutes County's comprehensive plan are the relevant provisions of the plan that should be considered in reviewing applications to change the zoning of EFU to a plan designation of urban industrial and Redmond zoning of Light and Heavy Industrial. Similarly, the relevant provisions should be considered to change the zoning of Redmond Light and Heavy Industrial to a plan designation of agriculture and zoning of EFU. Those relevant to this application ... are addressed below. Other provisions of the plan do not apply.

This Hearings Officer finds this finding is applicable to the subject proposal. The Hearings Officer's decision in the Applicant's first application for a rezone and re-designation, file nos. 247-14-000456-ZC, 247-14-000457-PA (hereinafter referred to as "Aceti 1"), quoted LUBA in *Save Our Skyline v. City of Bend*, 48 Or LUBA 192 (2004):

Comprehensive plan statements, goals and policies typically are not intended to, and do not, constitute mandatory approval criteria for quasi-judicial land use permit applications. Save Our Skyline v. City of Bend, 48 Or LUBA 192 (2004). There, LUBA held

'As intervenor correctly points out, local and statutory requirements that land use decisions be consistent with the comprehensive plan do not mean that all parts of the comprehensive plan necessarily are approval standards. [Citations omitted.] Local governments and this Board have frequently considered the text and context of cited parts of the comprehensive plan and concluded that the alleged comprehensive plan standard was not an applicable approval standard. [Citations omitted.] Even if the comprehensive plan includes provisions that can operate as approval standards, those standards are not necessarily relevant to all quasi-judicial land use permit applications. [Citation omitted.] Moreover, even if a plan provision is a relevant standard that must be considered, the plan provision might not constitute a separate mandatory approval criterion, in the sense that it must be separately satisfied, along with any other mandatory approval criteria, before the application can be approved. Instead, that plan provision, even if it constitutes a relevant standard, may represent a required consideration that must be balanced with other relevant considerations. [Citations omitted.]'

*LUBA went on to hold in *Save Our Skyline* that it is appropriate to 'consider first whether the comprehensive plan itself expressly assigns a particular role to some or all of the plan's goals and policies.' Section 23.08.020 of the county's comprehensive plan provides as follows:*

The purpose of the Comprehensive Plan for Deschutes County is not to provide a site-specific identification of the appropriate land uses which may take place on a particular piece of land but rather it is to consider the significant factors which affect or are affected by development in the County and provide a general guide to the various decisions which must be made to promote the greatest efficiency and equity possible, while managing the continuing growth and change of the area. Part of that process is identification of an appropriate land use plan, which is then interpreted to make decisions about specific sites (most often in zoning and subdivision administration) but the plan must also consider the sociological, economic and environmental consequences of various actions and provide guidelines and policies for activities which may have effects beyond physical changes of the land. (Emphasis added.)

The Hearings Officer previously found that the above-underscored language strongly suggests the county's plan statements, goals and policies are not intended to establish approval standards for quasi-judicial land use permit applications.

*In *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006), LUBA found it appropriate also to review the language of specific plan policies to determine whether and to what extent they may in fact establish decisional standards. The policies at issue in that case included those ranging from*

*aspirational statements to planning directives to the city to policies with language providing 'guidance for decision-making' with respect to specific rezoning proposals. In Bothman LUBA concluded the planning commission erred in not considering in a zone change proceeding a plan policy requiring the city to '[r]ecognize the existing general office and commercial uses located * * * [in the geographic area including the subject property] and discourage future rezonings of these properties.' LUBA held that:*

** * * even where a plan provision might not constitute an independently applicable mandatory approval criterion, it may nonetheless represent a relevant and necessary consideration that must be reviewed and balanced with other relevant considerations, pursuant to ordinance provisions that require * * * consistency with applicable plan provisions. (Emphasis added.)*

The county's comprehensive plan includes a large number of goals and policies. The applicant's burden of proof addresses goals for rural development, economy, transportation, public facilities, recreation, energy, natural hazards, destination resorts, open spaces, fish and wildlife, and forest lands. The Hearings Officer finds these goals are aspirational in nature and therefore are not intended to create decision standards for the proposed zone change."

As the Hearings Officer held in Aceti 1, "depending upon their language, some plan provisions may require 'consideration' even if they are not applicable approval criteria." *Save Our Skyline v. City of Bend*, 48 Or LUBA 192, 209 (2004). Consistency with the plan provisions that require consideration is addressed in detail in the findings below.

B. That the change in classification for the subject property is consistent with the purpose and intent of the proposed zone classification.

FINDING: Section 3.4 of the DCCP, includes the following language for the rural industrial designation:

Rural Industrial

The county may apply the Rural Industrial plan designation to specific property within existing Rural Industrial exception areas, or to any other specific property that satisfies the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, this Comprehensive Plan and the Deschutes County Development Code, and that is located outside unincorporated communities and urban growth boundaries. The Rural Industrial plan designation and zoning brings these areas and specific properties into compliance with state rules by adopting zoning to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.

The subject property is not within existing Rural Industrial exception areas and is located outside unincorporated communities and urban growth boundaries. Therefore, the property must be found to satisfy the requirements for a comprehensive plan designation change set forth by State Statute, Oregon Administrative Rules, the DCCP and the Deschutes County Development Code.

As stated in Section 3.4 of the DCCP, quoted above, RI plan designation and zoning brings specific properties, such as the subject property, into compliance with state rules "by adopting zoning **to ensure that they remain rural and that the uses allowed are less intensive than those allowed in unincorporated communities as defined in OAR 660-022.**" (emphasis added).

DCC 18.100.010 states the purpose of the RI Zone is:

"... to encourage employment opportunities in rural areas and to promote the appropriate economic development of rural service centers which are rapidly becoming urbanized and soon to be full-

service incorporated cities, while protecting the existing rural character of the area as well as preserving or enhancing the air, water and land resources of the area."

The record supports a finding that rezoning the subject property to RI is consistent with the purpose and intent of the RI zone. The Applicant's proposed zone change would create employment opportunities in rural areas in general and in the rural Deschutes Junction⁵ area in particular. There are more than 4,000 people living in the Deschutes Junction area who largely commute to Redmond or Bend. Some could seek employment in businesses that may be permitted in the new RI zone, meeting goals for fewer miles traveled to work and enhancing air quality and reducing fuel usage.

Because the application does not seek approval of any specific use on the subject property, rezoning it to RI will not directly impact the "existing rural character of the area," nor the air, water and land resources of the area. The Hearings Officer finds that substantial evidence in the record supports a finding that the proposed zone change is consistent with the current character of the area which is primarily characterized by the US 97 interchange (a key transportation hub) and rural industrial and rural commercial uses adjacent to the subject property. There are no large farm/commercial farming activities in the surrounding area.

As detailed in the Findings of Fact above (Sections E, F, G, H and I), the "existing rural character of the area," has been significantly impacted by construction of the Deschutes Junction overpass project and the surrounding road network, which includes a proposed new roundabout that will require a portion of TL 104 for its construction. 57.7 acres of property to the east across US 97 are zoned RI and developed with a variety of rural industrial uses. Immediately to the west, is property owned and used by the Three Sisters Adventist Christian School. Between the subject property and the school is a graveled 40-foot wide easement, along the entire western property line of TL 201, which will be used during the construction of the new roundabout. To the north, on both sides of US 97 and both sides of Tumalo Road, Tumalo Place and Deschutes Pleasant Ridge Road are commercial, retail, wholesale and industrial businesses. The 29.04-acre lot directly north of the subject lots is split zoned Rural Commercial and MUA-10. Property across the road to the north and northwest is zoned MUA-10 and is vacant or developed with single-family dwellings. The parcels immediately to the south of the subject property are developed with three rental houses and the Barrett barn that is no longer used. The remaining land to the southeast is scrub lands and is publicly owned.⁶

The Hearings Officer finds that the "existing rural character of the area," does not consist of bucolic farmland and small farm-related buildings, but instead is a hodgepodge of various rural industrial and rural commercial uses, a school, several dwellings and scrub land.

With respect to the purpose of the RI zone to preserve or enhance the air, water and land resources of the area, the Hearings Officer also relies on the Findings of Fact above (Sections E, F, G, H and I). Substantial evidence in the record shows the negative impact of the adjacent US 97 and surrounding road network/traffic on air quality and noise. Land resources in the area generally have not been

⁵ The Applicant changed references to "Deschutes Junction" in its materials, as explained on pages 2-3 of the Burden of Proof. According to *Oregon Geographic Place Names*, "Deschutes Junction" was the official name of a railroad station near Biggs, and is also the term used by the County Roads Department and ODOT for the junction or intersections of Tumalo Road, Tumalo Place, Deschutes-Pleasant Ridge Road, Deschutes Market Road and US 97. *Oregon Geographic Place Names* lists "Deschutes" as the official name of the community. Accordingly, the Applicant uses "Deschutes" to refer to the town and community, and "Deschutes Junction" to refer to the intersection of the roads around the overpass.

⁶ The Hearings Officer notes that, when the property is developed in the future, uses allowed in the RI zone outright or conditionally will be subject to the use limitations of DCC 18.100.030 which provide some impact protections for adjacent and "across a street" residential neighbors. DCC 18.100.030 restricts industrial uses on a "lot adjacent to or across the street from a residential dwelling." If the subject property is divided into smaller industrial use lots, adjacent and "across a street" neighbors will receive DCC 18.100.030 impact protections only from any immediately adjacent industrial use, but no such protections from new "internal" lots in the development. See the Hearings Officer's decision in 4-R Equipment 247-14-000131-CU, 247-14-000132-SP.

preserved for agricultural use as there are no active agricultural uses adjoining the subject property. One agricultural use in the vicinity is east of US 97, one-half mile northeast of the subject site. There are no agricultural uses within one mile north of the property. Within one-half mile west of the property, two 20-acre parcels are in pasture and horses. There are four 10-acre parcels along Half Mile Lane and some properties south of Tumalo Road (.5 to 5 acres in size) that may be characterized as "hobby farms" with a few head of horses, sheep, cattle, alpacas or llamas. There is no evidence of water resources of the area that would be affected by the proposed rezone, other than the fact that the nearby irrigation pond, originally used to provide water to the subject property, has been significantly reduced in size by the US 97 expansion and has been dry this year. The Pilot Butte Canal is 200 feet east of the subject property.

When the property is developed in the future, uses allowed in the RI zone outright or conditionally will be subject to review and conditions of approval (if appropriate) may be imposed to minimize adverse impacts on air and water quality and other land resources in the area pursuant to site plan review under DCC Chapter 18.124 (all uses) and DCC Chapter 18.128 (conditional uses).

The Hearings Officer notes that the use limitations of DCC 18.100.030 provide some impact protections for adjacent and "across a street" residential neighbors. DCC 18.100.030 restricts industrial uses on a "lot adjacent to or across the street from a residential dwelling." If the subject property is divided into smaller industrial use lots, adjacent and "across a street" neighbors will receive DCC 18.100.030 impact protections only from any immediately adjacent industrial use, but no such protections from new "internal" lots in the development. See the Hearings Officer's decision in *4-R Equipment 247-14-000131-CU, 247-14-000132-SP*.⁷

For all the foregoing reasons, I find that the proposed change in classification for the subject property is consistent with the purpose and intent of the proposed zone classification, RI, as set forth in DCC 18.100.010. This criterion is met.

C. *That changing the zoning will presently serve the public health, safety and welfare considering the following factors:*

1. *The availability and efficiency of providing necessary public services and facilities.*

FINDING: Substantial evidence in the record shows that necessary public facilities and services are available to serve future rural industrial development on the subject property. No services need to be extended from the UGB; the subject property is located approximately 3.25 miles north of the Bend UGB and approximately 6.25 miles south of the Redmond UGB. The City of Bend's municipal water and sewer systems are not needed to develop the site and do not extend north of the UGB. Any future development at the site will require a septic system for sewage treatment. No urban services will be necessary. There is no evidence that necessary public services and facilities cannot be provided to the subject site in an efficient manner. Rather, the record includes will-serve letters that show available and efficient public services.

Because this is not an application for residential uses, the rezone will not result in additional students in the Bend-La Pine School District. The property is included in the Bend-La Pine Public School District.

The property receives fire protection from the Deschutes County Rural Fire District No. 2 through the City of Bend Fire Department. The District provides fire protection and ambulance services to the site. Fire Station #302 is located 3.5 miles west of the property in Tumalo, and Fire Station 305 is located

⁷ Whether the private school to the west of the subject property will be considered a "residence" for which protections under DCC 18.100.030 may be required as a condition of approving a future conditional use permit or site plan application on the subject property will be decided by the County under the facts and law in existence at the time of such application.

4.0 miles south at Jamison Street, near the county jail. No comments from the Fire Department were submitted on the Applicant's proposal. As required by the conditions of approval for a conditional use permit issued to the Applicant in 1997, the Applicant paid to install two fire hydrants, surrounded by bollards, one on the northern portion near the overpass approach and one at the southern end of the parcel. Applicant also installed an associated 12-inch diameter water line that runs the entire length of the property (1,342 feet) to the fire hydrants in 2000. At that time, the smaller remnant parcel, TL 104, had not been created. The water line is connected to the Avion Water Company, Inc. domestic water pipe at the north property line along the County's right-of-way for Tumalo Place.

The property receives police protection from the Deschutes County Sheriff. Deputies drive Tumalo Road daily on their regular patrol route.

The Applicant submitted into the record a letter from Pacific Power indicating that they can provide electrical service and a letter from Avion Water Company indicating it is willing and capable to serve the site and to the Deschutes Junction area. Three wood power poles and associated electrical wires were installed by Pacific Power in 1995 to transmit electricity from Tumalo Road to the storage building on the subject property. Above ground power lines deliver power to the entire western boundary of the site. Power is being used on site in the building/office/shop. Three phase power is available now to the western and northern property lines. The application is supported by a will-serve letter from Pacific Power, which states it can provide adequate power to the entire subject site if it is developed as rural industrial.⁸

Century Link telephone and internet service is hardwired into the office on the property. A fiber optic data transmission cable is located beside the eastern edge of the subject property between the fence line and US 97.

The site does not have a sewer or septic disposal system. An appropriate on-site sewage disposal system will be designed and built when a specific use is planned, during a building permit and future site plan application.

The application also includes a January 14, 2013 flow test for the water lines in the subject property. An easement agreement between Aceti and Avion Water Company was recorded on March 18, 2002 for ten feet of land on each side (20-feet total width) of the underground waterline that commences at the southern edge of the right-of-way for Tumalo Place at a point about 373 feet from the western property line and runs south for the entire length of TL 201.

The Burden of Proof states at page 83 that "[t]he requested rezone will likely result in creating some new jobs and additional income tax revenues. Also, because of the increased property values, it will result in more property tax revenue for the County, library district, public schools and other public services."

The Hearings Officer's findings regarding availability and efficiency of necessary public facilities in the context of transportation and the surrounding road system are set forth in the findings on the Deschutes County Transportation System Plan ("TSP"), which was adopted by Ordinance 2012-005 and is

⁸ The Applicant's Burden of Proof at page 74 states, "On January 13, 2004, Angela Van Burger, Regional Community Manager for Pacific Power wrote a letter to Mr. Aceti indicating that the utility is interested in locating a new combined service center for the Central Oregon operations on the site, if the EFU zoning is changed to a more appropriate zoning. The service center will need 10 to 15 acres with highway access. Suitable large lots such as this are not available in the urban areas. The operation center will dispatch service trucks, line equipment vehicles with pole trailers and receive inventory of heavy equipment via semi-truck trailer. Locating the service center on Aceti's property will increase efficiency and safety for Pacific Power. The subject site is uniquely centrally located for the utility because Pacific Power serves Bend, Redmond, Prineville, and Madras. It could respond to service outages in more timely manner. Therefore, this zone change could help the community and the utility with response times."

contained with Appendix C of the DCCP and in the findings on Oregon Administrative Rule (OAR) 660, Division 12, Transportation Planning.

For all the foregoing reasons, the Hearings Officer finds this criterion is met.

2. *The impacts on surrounding land use will be consistent with the specific goals and policies contained within the Comprehensive Plan.*

FINDING: As set forth in the findings above, (Sections E, F, G, H and I), surrounding lands uses include the US 97 interchange and rural industrial uses across US 97. To the north, there is an approximately 2-acre Rural Commercial zone (RC) developed with a building/landscaping supply business, with which the DCC 18.100 rural industrial uses would likely be compatible. Surrounding properties to northwest are zoned MUA-10 and are developed with rural residences. Properties to the west and southwest are zone EFU and are generally developed with rural residences. Some of these properties have small-scale agriculture and/or hobby farms associated with irrigated pasture. There is a private school immediately to the west. The Hearings Officer takes into consideration the existing impacts on surrounding land resulting from US 97, the Deschutes Junction overpass, surrounding road network, future roundabout to be constructed at Tumalo Place/Tumalo Road, and existing rural industrial and rural commercial uses.

Impacts to surrounding land uses resulting from the requested rezone and re-designation must be determined to be consistent with the specific goals and policies in the DCCP. Specific comprehensive goals and policies pertaining to these surrounding land uses are discussed in the section of this decision addressing the DCCP, in the findings below. The Hearings Officer's review includes consideration of the range of uses allowed outright and conditionally in the RI zone which inform a decision on whether expected or anticipated impacts of such potential uses on surrounding land use will be consistent with the specific goals and policies in the DCCP. Although no specific development is proposed at this time, the Hearings Officer notes that potential impacts to surrounding land use from industrial uses generally include traffic, visual impacts, odor, dust, fumes, glare, flashing lights, noise, and similar disturbances. Again, such impacts are considered in light of existing impacts of development and roads in the surrounding area.

For the reasons set forth in the findings regarding consistency with the DCCP set forth specifically below, the Hearings Officer finds that the impacts of the proposal on surrounding land use will be consistent with the goals and policies of the comp plan. I find this criterion is met.

D. *That there has been a change in circumstances since the property was last zoned, or a mistake was made in the zoning of the property in question.*

FINDING: The Applicant alleges both that a change of circumstances warrant approval of the requested rezone, and that a mistake was made in the original zoning of the subject property because detailed soils data was not available to the County at the time. Pages 144-154 of the Applicant's Burden of Proof details significant, numerous changes in circumstances that have resulted in an inability to farm the property, including reductions in acreage, the construction of the overpass approach bisecting the property and the realignment of roads, the increase in traffic around and through the property, the sale of all the associated parcels around it since 1980 for non-agricultural uses and others. The Applicant asserts that, if the property was being zoned today, it would not be zoned EFU.

1. Mistake.

As the Hearings Officer found in Aceti 1, I find that the original EFU zoning of the subject property was not a mistake at the time of its original designation. The property's EFU designation and zoning were appropriate in light of the soil data available to the county in the late 1970s when the comprehensive plan and map were adopted.

2. Change in Circumstances.

Due to all the changes in circumstances and improved soil data not available to the County at the time the property was last zoned, the Applicant contends it is not appropriate or prudent to keep the EFU zoning. Page 192 of the Burden of Proof states:

We presume that the EFU-TRB zone in 1979 resulted from its being on the edge of and part of the 115-acre Barrett's Deschutes Ranch. The zoning of the subject property was not based on a parcel-specific soils analysis or on the agricultural capability of this parcel by itself. From experience, the owner knew then not to plow the parcel to prevent the expensive farm implements from being bent by the rock, and that it was not worth the cost of power for water pumps or of the pipe itself, and seed and effort to grow a crop. The County did not know that. We now have data that shows the land is not primarily resource soils. (See Attachment 2, Soils Capability Assessment.)

The zoning did not consider the population, parcelization and rapid growth in population in the area. Subdivisions were done in the 1960s and 1970s and already Long Butte and the area south of Tumalo Road were entirely subdivided into residential lots. It was not in an agricultural area. Circumstances at the time of the first zoning code already pointed to the urban nature of the area and its commitment to urbanization. See the Section 21 on the history of Deschutes, Section 22 about previous owners and how they used the property and Section 23 about changes in circumstances. Unfortunately, the 20.26 acres (the subject property) and the narrow strip on its eastern and southern sides in the rock spine were the worst acres of the original homestead and were not even cleared of native vegetation until after 1950. Since 1979 the parcel has been significantly reduced in size and reconfigured into two portions by road construction. In 1979, the land was not irrigated. In 1979 when it was zoned, US Highway 97 was two lanes. Tumalo Place did not exist. Tumalo Road was at the property's northern edge.

Parcels to the west were either unproductive and fallow or had been broken up as small hobby farms and residential subdivisions. Long Butte was already subdivided into Whispering Pines Estates, as was Starwood and other rural subdivisions nearby, totaling over 1,700 residential lots. Residential development was already significant and the US 97 immediately adjacent to the subject site made farming difficult and hazardous to the highway travelers due to the prevailing winds blowing dust of tilling itself and fragile newly-tilled soils across the highway when the original zone was assigned.

See the information on James R. Low and other owners who avoided farming this parcel in 22, pages 132-143. Also see the historic property lines on the 1935, 1944 and 1972 Metsker's Maps, Figures 51, 52, and 53.). The 1972 property ownership map is repeated here and shows the committed subdivisions at the beginning of the Statewide Planning Program and at the time of the original zoning. In the early 1970s few parcels were of adequate size for a productive commercial farm and most of those were either rocky, in public ownership (labeled US) or were already surrounded by urbanization.

When we compare the original 160-acre Deschutes Ranch owned by James R. Low until 1947 (outlined in green above), with the situation in 1979 when the parcels were zoned, we find that Low's land was crossed by US 97, Nichols Market Road and the Pilot Butte Canal. The Barretts' cattle ranch was already incompatible with the urbanization of the area and the Barretts were looking to sell out. The above 1972 map shows the parcels at the time of the original land use

planning effort. The Deschutes Ranch was broken into 13 parcels that were sold by 1995, in addition to the land for road and the canal. Within seven years, the 7th Day Adventist school was underway. US 97 was widened to 4 lanes in 1992, taking land from the subject property.

Long Butte was never farmed, as its soil is nearly non-existent, and the steep slope made irrigation infeasible. But, it had great views. By 1979 it was an urban density subdivision. Whispering Pines, Starwood, El Rancho and Glacier subdivisions are shown on the map. Already by 1972 about 1,500 residential lots were subdivided at Deschutes, adjacent to the subject property.

Also, the unique system of important roads going in all directions and the establishment of the post office and Deschutes Railroad Passenger and Freight Station and the town of Deschutes in 1911 gave early indications that the area would be urbanized.

It can be successfully argued that the original EFU-TRB zone was in error, but, due to all of the changes in circumstances, and in light of the soil data available to the county today, it is not appropriate or prudent to keep the EFU zoning that was applied to the larger Barrett ranch in the 1970's when the comprehensive plan and map were adopted.

The Applicant submitted evidence showing changes in circumstances that have occurred since the property was originally zoned EFU by the County including:

- The reduction of the number of acres in the Applicant's parcel due to continuing road projects, widening US 97 to four lanes, constructing the overpass on the subject property, creating Tumalo Place with on and off ramps to the highway, realizing Deschutes Market and Tumalo Road, closing the Deschutes Pleasant Ridge Road railroad crossing, and closing Gift Road at US 97.
- Adding an agreement that ODOT can add a frontage road across the property.
- Adding new easements for access along the western property line and in the center for Avion water Company and thereby taking away usable and developable acres.
- Decrease in developable acres due to additional setbacks from the new property lines for the overpass approach.
- The reconfiguration of the parcel into two distinct, irregularly-shaped portions that are difficult, expensive, and nearly impossible to farm and irrigate.
- The new soils data in the Borine soils capability study that demonstrates the property does not have agricultural soil.
- The construction of the Deschutes Junction Overpass across the subject property.
- The re-routing of Bend-Redmond commuter traffic onto roads that go around the subject property.
- The construction and realignment of Tumalo Place, Tumalo Road, Deschutes Market Road, and Pleasant Ridge Road around the property and takings of land.
- The changes in the source and delivery systems for irrigation water from the Swalley Irrigation District.
- The lack of a Swalley easement to allow the delivery of irrigation water a quarter mile to the property across three properties in separate ownership who do not irrigate.
- The construction of the Swalley Hydroelectric facility that adversely affected Applicant's in-stream leasing of irrigation water.
- The re-zone of some of the adjacent United Pipe property and some of Robinson's property to RI and the 57.7 acres of RI zoned land at Deschutes.
- The continuous subdivision, platting and re-platting of new residential lots and building of homes in the immediate vicinity.

In ZC-01-1, the Hearings Officer found that, "...any change in circumstance justifying a zone change must be to the subject property or other property in the vicinity and not to the property owner's

circumstances or needs." I find that the above-described general circumstances have changed with respect to the subject property and/or to other property in the vicinity since 1990 and are not representative of a change in the property owner's circumstances or needs.

The Applicant asserts that "[a]nyone would be hard pressed to find a rural property in the county that has undergone more changes in circumstances than the subject property." Burden of Proof at page 194. The Hearings Officer agrees. For all the foregoing reasons, I find that the Applicant has established the public interest is best served by rezoning the property under the criteria set forth in DCC 18.136. The criteria are met.

D DESCHUTES COUNTY COMPREHENSIVE PLAN

Chapter 2. Resource Management

Section 2.2 Agricultural Lands

Goals and Policies

Goal 1 *Preserve and maintain agricultural lands and the agricultural industry.*

FINDING: The Hearings Officer found in Aceti 1 this is an aspirational goal and not an approval criterion. LUBA determined that the subject property does not constitute Agricultural Lands under OAR 660-033-0020(1); this finding is binding under the law of the case doctrine as discussed above.

Substantial evidence in the record supports a finding that the subject property does not constitute agricultural land that must be preserved as set forth in the Applicant's site-specific soil study and as previously found by the Hearings Officer, the BOCC and LUBA. There is no evidence in the record that the proposal will adversely impact surrounding agricultural lands or the agricultural industry, particularly considering the surrounding road network, impacts of nearby heavy traffic and transportation, impacts due to the expansion of US 97 and surrounding commercial and industrial uses already in existence.

Policy 2.2.2 Exclusive Farm Use sub-zones shall remain as described in the 1992 Farm Study shown in the table below, unless adequate legal findings for amending the sub-zones are adopted or an individual parcel is rezoned as allowed by Policy 2.2.3.

FINDING: The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than at an individual applicant. In any case, the Applicant is not requesting an amendment to the subzone (EFU-TRB) that applies to the subject property.

Policy 2.2.3 Allow comprehensive plan and zoning map amendments, including for those that qualify as non-resource land, for individual EFU parcels as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan.

FINDING: The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than an individual applicant. In any case, the Applicant has requested a quasi-judicial plan amendment and zone change to remove the EFU designation and zoning from the subject property. LUBA has determined that the subject property is not "Agricultural Land" subject to Goal 3. The Hearings Officer finds the Applicant's proposal is authorized by policies in the DCCP and is permitted under state law.

Policy 2.2.4. Develop comprehensive policy criteria and code to provide clarity on when and how EFU parcels can be converted to other designations.

FINDING: The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than at an individual applicant. In said decision, the Hearings Officer cited a previous decision for file nos. PA-14-2 and ZC-14-2 that stated, "In any event, in my decision in NNP (PA-13-1, ZC-13-1) I held any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning."

Hearings Officer Green determined in file nos. 247-14-000456-ZC/457-PA that "any failure on the county's part to adopt comprehensive plan policies and code provisions describing the circumstances under which EFU-zoned land may be converted to a non-resource designation and zoning does not preclude the county from considering quasi-judicial plan amendment and zone change applications to remove EFU zoning." Consistent with this ruling, I find that, until such time as the County establishes policy criteria and code on how EFU parcels can be converted to other designations, the current legal framework can be used and must be addressed.

Policy 2.2.13. Identify and retain accurately designated agricultural lands.

FINDING: The Hearings Officer found in Aceti 1 that this policy is directed at the County rather than an individual applicant. Nonetheless, as determined by LUBA and binding on the parties, I find that the subject property does not constitute "Agricultural Land."

Section 2.5 Water Resources

Goals and Policies

Policy 2.5.24. Ensure water impacts are reviewed and, if necessary, addressed for significant land uses or developments.

FINDING: The Hearings Officer found in Aceti 1 that this policy is directed at the County. In said decision, the Hearings Officer cited a previous decision of Hearings Officer Green for file nos. PA-14-2 and ZC-14-2 that stated, "Nevertheless, in my decision in NNP I held it is not clear from this plan language what "water impacts" require review -- impacts to water supplies from use or consumption on the subject property, or impacts to off-site water resources from development on the subject property." The Applicant has not proposed any particular land use or development, and any subsequent applications for development of the subject property would be reviewed under the County's land use regulations that include consideration of a variety of on- and off-site impacts.

The Hearings Officer finds it is premature to review "water impacts" because the Applicant has not proposed any particular land use or development. Thus, there are no "significant land uses or developments" that must be reviewed or addressed in this decision. Any subsequent applications for development of the subject property will be reviewed under the County's land use regulations, which include consideration of a variety of on- and off-site impacts. Notwithstanding this statement, the Hearings Officer includes the following findings.

The Applicant's requested zone change to RI would allow a variety of land uses on the subject property. The land east of the subject property (57 acres) is zoned RI and developed with a variety of rural industrial uses. Consequently, it is likely that similar development may occur on the property if it were re-designated and rezoned to RI. In light of existing uses in the surrounding area, and the fact that Avion Water Company provides water service in the Deschutes Junction area, and a 12-inch diameter Avion water line and two fire hydrants are already installed on site, future development of the subject property with uses permitted in the RI Zone will have water service.

The subject property has 16 acres of irrigation water rights and, therefore, the proposed plan amendment and zone change will result in the loss or transfer of water rights unless it is possible to bring some irrigated water to the land for other allowed beneficial uses, such as irrigated landscaping. As stated in the Applicant's Burden of Proof, the 16 acres of irrigation water rights are undeliverable and are not mentioned in the property deed. The Applicant has not grown a crop on the subject property or effectively used his water right since the overpass was constructed in 1998.

The Hearings Officer finds that the proposal will not, in and of itself, result in any adverse water impacts. The proposal does not request approval of any significant land uses or development.

Chapter 3. Rural Growth Management

Section 3.4 Rural Economy

Goals and Policies

Goal 1 *Maintain a stable and sustainable rural economy, compatible with rural lifestyles and a healthy environment.*

The Hearings Officer incorporates the findings regarding compatibility with "rural character" from DCC 18.136.020(B) herein by reference to address "rural lifestyles." No adverse impacts to the "rural economy" or "healthy environment" have been identified in the record.

Policy 3.4.23 *To assure that urban uses are not permitted on rural industrial lands, land use regulations in the Rural Industrial zones shall ensure that the uses allowed are less intensive than those allowed for unincorporated communities in OAR 660-22 or any successors.*

FINDING: The Hearings Officer finds this policy is directed at the County and not an individual applicant. The RI code is acknowledged, valid, and does not permit urban uses, as LUBA determined in LUBA No. 2018-126. The Applicant noted in his September 15, 2020 submittal that the first outright use listed in the RI and in the RC zone is farm use. He submits that this additionally supports a finding that RI and RC zoning is considered compatible in the rural county and is not an urban type or size of use.

Policy 3.4.27 *Land use regulations shall ensure that new uses authorized within the Rural Industrial sites do not adversely affect agricultural and forest uses in the surrounding area.*

FINDING: The Hearings Officer finds this policy is directed at the County and not at an individual applicant. In any case, the Applicant's proposal does not change the land use regulations in the RI Zone. Substantial evidence in the record supports a finding that the zone change and plan amendment will not have an adverse effect on agricultural and forest uses in the surrounding area. The Applicant has completed an exhaustive inventory of uses within half mile of the site and found no conflict with any agricultural or forest use. No evidence to refute the Applicant's study was introduced into the record.

Policy 3.4.28 *New industrial uses shall be limited in size to a maximum floor area of 7,500 square feet per use within a building, except for the primary processing of raw materials produced in rural areas, for which there is no floor area per use limitation.*

Policy 3.4.31 *Residential and industrial uses shall be served by DEQ approved on-site sewage disposal systems.*

Policy 3.4.32 Residential and industrial uses shall be served by on-site wells or public water systems.

FINDING: The Hearings Officer found in the Aceti 1 that these policies apply to quasi-judicial applications and are inapplicable to the Applicant for the proposed rezone and plan amendment. These policies are codified in DCC Chapter 18.100 and are implemented through those provisions. The Applicant is not applying for any specific building permit, site plan or conditional use approval at this time, and the proposal does not change the land use regulations in the RI Zone.

Policy 3.4.36 Properties for which a property owner has demonstrated that Goals 3 and 4 do not apply may be considered for Rural Industrial designation as allowed by State Statute, Oregon Administrative Rules and this Comprehensive Plan. Rural Industrial zoning shall be applied to a new property that is approved for the Rural Industrial plan designation.

FINDING: The Hearings Officer finds the Applicant has demonstrated that Goals 3 and 4 do not apply to the subject property as affirmed in LUBA No. 2016-012. Therefore, I find the subject property can be considered for the proposed Rural Industrial designation and Rural Industrial zoning as proposed. Compliance with applicable ORS, OAR, and DCCP provisions is addressed in the findings herein.

Section 3.5. Natural Hazards

Goal 1 Protect people, property, infrastructure, the economy and the environment from natural hazards.

FINDING: The Hearings Officer finds this policy is directed at the County rather than at an individual applicant. Nonetheless, I find there are no mapped flood or volcano hazards on the subject property or in the surrounding area. Additional hazards include wildfire, earthquake, and winter storm risks, which are identified in the County's DCCP. There is no evidence the proposal would result in any increased risk to persons, property, infrastructure, the economy and the environment from unusual natural hazards.

Section 3.7. Transportation

The Transportation System was adopted in Ordinance 2012-005 and is hereby incorporated into this Plan as Appendix C. The Deschutes County Transportation System Plan Map will be retained in official replica form as an electronic map layer within the County Geographic Information System and is adopted as part of this Comprehensive Plan.

FINDING: The Transportation planning program has been summarized and incorporated into the Deschutes County Transportation System Plan ("TSP"), which was adopted by Ordinance 2012-005 and is contained with Appendix C of the DCCP. Consistency with the applicable goals and policies of the TSP is addressed below in the findings under Appendix C and in the findings on Oregon Administrative Rule (OAR) 660, Division 12, Transportation Planning.

Section 3.10. Area Specific Policies

Goals and Policies

Goal 1 Create area specific land use policies and/or regulations when requested by a community and only after an extensive public process.

Policy 3.10.1 Maintain a list of communities interested in area specific policies and as resources permit, initiate public processes to address local issues.

FINDING: As the Hearings Officer found in Aceti 1, these policies are directed at the County and not intended to be an approval criterion for plan amendment and zone change applications for land in the Deschutes Junction area.

Deschutes Junction

Policy 3.10.5 Maximize protection of the rural character of neighborhoods in the Deschutes Junction area while recognizing the intended development of properties designated for commercial, industrial and agricultural uses.

FINDING: The Hearings Officer incorporates the "rural character" discussion from DCC 18.136.020(B) herein by reference. No adverse impacts to "rural character of neighborhoods in the Deschutes Junction area" from the proposal have been identified in the record.

The Applicant's Burden of Proof thoroughly reported on the history, previous owners and surrounding uses as well as the transportation system in Section 17, Transportation; Section 21 History of Deschutes Junction; Section 22, Previous Owners and How They Used the Property; Section 23, Changes in Circumstances; and Section 24, Surrounding Zoning and Land Uses. Deschutes Junction has not been suitable for agriculture and has had an extensive, well-developed transportation system of county and state highways and roads that resulted in non-agricultural development.

Substantial evidence in the record supports a finding that Deschutes Junction is well developed and is not what is typically envisioned by the term "agricultural area". It includes over 1,252 urban sized lots, has 57.7 acres of land zoned and used for Rural Industrial, and many commercial uses that predate Oregon's land use program. Deschutes Junction has mixed residential, commercial, industrial and hobby farm uses. A significant geographic and land use feature of Deschutes Junction is the extensive transportation system there. The road and highway network, the State Highway interchange and the railroad tracks and spurs are the dominant features. The County and ODOT are planning more roads that will significantly affect the subject site and immediate area of the subject site. They include providing for better access (possibly a diamond interchange) to the Deschutes Junction Interchange with US Highway 97, a new frontage road on the west side of US Highway 97 from Quarry Avenue (US 97: Redmond Refinement Plan, Quarry Avenue-Deschutes Market Road) or Gift Road to Deschutes Junction Frontage Road, the new roundabout at Tumalo Road and Tumalo Place, and the necessary new road to the Deschutes County Fairgrounds, usually referred to as the 19th Street Extension Project.

The Applicant submits that the area specific policies for Deschutes Junction primarily address the intended development of properties designated for commercial, industrial and agricultural uses. The Applicant argues that this policy recognizes the historic urbanization of the area since it was platted as a town in 1911, the commitment to urbanization that preceded the planning program and the fact that 50% of the rural industrial zoning in the county is at Deschutes Junction. As County Surveyor Mike Berry states, Deschutes Junction has the only overpass across US 97 between Bend and Redmond and there have been more roads crossing at that location since 1908 than anywhere in the county. Hundreds of acres of industrial, retail, residential subdivisions, commercial, and hobby farm uses are zoned RI, RC, MUA-10 and RR-10.

The record shows that the subject property, in particular, is more impacted by the road/highway development in Deschutes Junction than any other adjacent or adjoining property given its bisection in 1998 for construction of Tumalo Road and the US 97 overpass. Based on this fact, I find that potential industrial development of the subject property will not negatively impact any remaining "rural character" of Deschutes Junction because the remaining rural uses are to the south and northwest of the property and more distant from the impacts of highway, overpass and road system. Arterial roads surrounding

the property, including its bisection by the overpass project, connect rural commercial and industrial existing uses that constitute the “core” of Deschutes Junction with the subject property itself. Rural neighborhoods to the northwest of the property are located at enough of a distance from the highway/road interchange to be protected from any impact of commercial/industrial development of the property. I find that approval of the requested applications will protect any remaining rural character of neighborhoods in the Deschutes Junction area, while allowing the development of properties designated for rural commercial, rural industrial and agricultural uses.

Policy 3.10.6 Review cumulative impacts of future development and future traffic improvements in the Deschutes Junction area in a manner consistent with Deschutes County traffic study requirements at 17.16.115, the Oregon Highway Plan, access management standards of OAR Chapter 734, Division 51, and OAR Chapter 660, Division 12, the Transportation Planning Rule (TPR).

FINDING: The Hearings Officer finds this policy is directed at the County and not individual applicants. Nonetheless, I find that the Applicant's traffic study includes a “review of cumulative impacts” and is consistent with the cited requirements, as detailed in the findings below.

Policy 3.10.7 Support safe and efficient travel around Deschutes Junction, including a frontage road extending north from Tumalo Road on the west side of Highway 97.

FINDING: As the Hearings Officer found in Aceti 1, this policy is directed at the County and is not intended to be an approval criterion for plan amendment and zone change applications for land in the Deschutes Junction area.

Policy 3.10.8: Review Policies 3.10.11 through 3.10.13 and initiate a Deschutes Junction Master Plan.”

FINDING: These references are scrivener errors and should point to Policies 3.10.5 through 3.10.7. The Hearings Officer finds these policies are directed at the County rather than at an individual applicant.

Appendix C. Transportation System Plan

ARTERIAL AND COLLECTOR ROAD PLAN

Goal 4

4. ***Establish a transportation system, supportive of a geographically distributed and diversified economic base, while also providing a safe, efficient network for residential mobility and tourism.***

Policies

4.1 Deschutes County shall:

- a. ***Consider the road network to be the most important and valuable component of the transportation system.***

4.3 Deschutes County shall make transportation decisions with consideration of land use impacts, including but not limited to, adjacent land use patterns, both existing and planned, and their designated uses and densities.

4.4 Deschutes County shall consider roadway function, classification and capacity as criteria for plan map amendments and zone changes. This shall assure that proposed land uses do not exceed the planned capacity of the transportation system. (Emphasis added.)

FINDING: As the Hearings Officer found in Aceti 1, the above-underscored language indicates these plan policies provide direction to the County but do not create approval criteria for a plan amendment and zone change. Nonetheless, the Hearings Officer includes findings based on a thorough, comprehensive traffic study prepared by Joe Bessman, PE, Transight Consulting, LLC, dated June 1, 2020 ("Traffic Study"), included as Attachment 1 to the Burden of Proof. Mr. Bessman submitted additional analysis in response to ODOT comments on September 1, 2020 ("Traffic Study Response"). The purpose of the Traffic Study is to document compliance with the Transportation Planning Rule (TPR) if a rezone is approved. Findings concerning the Traffic Study are set forth in detail below under Oregon Administrative Rule (OAR) 660, Division 12. Transportation Planning.

Review of the Traffic Study by the County Transportation Planner and the Deschutes County Road Department constitutes consideration of: (1) land use impacts, including but not limited to, adjacent land use patterns, both existing and planned, and their designated uses and densities; and (2) roadway function, classification and capacity, to ensure that proposed land uses do not exceed the planned capacity of the transportation system. The Hearings Officer notes that there are no planned land uses proposed with the subject application. The Traffic Study is based on consideration of a "worst-case" scenario of potential future development of the subject property.

Comments from the County Transportation Planner and the Deschutes County Road Department agree with the Traffic Study's assumptions, methodology and conclusions. The Hearings Officer finds that substantial evidence supports a finding that identified transportation impacts of the proposed redesignation and rezone can be adequately mitigated. The County Transportation Planner suggests that, instead of the Traffic Study's proposed mitigation for the intersections of Tumalo Road/Graystone Lane and Graystone Lane/Pleasant Ridge Road via property donations or acquisitions for future roundabouts, the County will assess transportation system development charges (SDCs) and other non-infrastructure mitigations as development occurs on the site on that development:

The current SDC rate is \$4,488 per peak trip. The County changes its SDC every July 1, per Board Resolution 2013-059. The actual SDC is based on the rate current when building permits are pulled, not the SDC rate when the land use is approved. The SDCs will mitigate the transportation impacts of the subsequent rural industrial development. Additionally, at time of future development, further traffic analysis may be required, depending on whether a future proposed development triggers the traffic analysis thresholds of Deschutes County Code (DCC) 18.116.310(C)(3). The County may also consider non-infrastructure mitigations (as an example, for manufacturing uses, start/stop times for workers would occur outside of the 7-9 a.m. and 4-6 p.m. peak hours), which are allowed under the Transportation Planning Rule (TPR) at OAR 660-012-0060(11).

The County Road Department agrees with the comments of the County Transportation Planner.

For the foregoing reasons, the Applicant's proposal is consistent with all applicable DCCP policies.

OREGON ADMINISTRATIVE RULE (OAR) 660

Division 12. Transportation Planning

OAR 660-012-0060. Plan and Land Use Regulation Amendments.

(1) If an amendment to a functional plan, an acknowledged comprehensive plan, or a

land use regulation (including a zoning map) would significantly affect an existing or planned transportation facility, then the local government must put in place measures as provided in section (2) of this rule, unless the amendment is allowed under section (3), (9) or (10) of this rule. A plan or land use regulation amendment significantly affects a transportation facility if it would:

- (a) *Change the functional classification of an existing or planned transportation facility (exclusive of correction of map errors in an adopted plan);*

FINDING: The Applicant is not asking the County to change the functional classification of an existing or planned transportation facility. This criterion is inapplicable.

- (b) *Change standards implementing a functional classification system; or*

FINDING: The Applicant is not asking the County to change standards that implement a functional classification system. This criterion is inapplicable.

- (c) *Result in any of the effects listed in paragraphs (A) through (C) of this subsection based on projected conditions measured at the end of the planning period identified in the adopted TSP. As part of evaluating projected conditions, the amount of traffic projected to be generated within the area of the amendment may be reduced if the amendment includes an enforceable, ongoing requirement that would demonstrably limit traffic generation, including, but not limited to, transportation demand management. This reduction may diminish or completely eliminate the significant effect of the amendment.*
 - (A) *Types or levels of travel or access that are inconsistent with the functional classification of an existing or planned transportation facility;*
 - (B) *Degrade the performance of an existing or planned transportation facility such that it would not meet the performance standards identified in the TSP or comprehensive plan; or*
 - (C) *Degrade the performance of an existing or planned transportation facility that is otherwise projected to not meet the performance standards identified in the TSP or comprehensive plan.*

FINDING: The Traffic Study states on page 2, in relevant part:

The Aceti property has a considerable history with County planning staff and has attempted this rezone previously with the application denied due to non-transportation issues. While the land use narrative includes a more complete description of the impacts that have occurred with the reconstruction of the Deschutes Junction, the inclusion of the culvert undercrossing, ODOT negotiations, and other issues, Deschutes County Road Department staff have previously acknowledged the impacts that have occurred with these other projects. Due to the impacts the County projects created on the Aceti property, Deschutes County has previously agreed not to oppose future rezoning of the property, as contained within the attachments.

The Traffic Study analyzes allowable uses in the existing EFU zone and compares them to the allowable uses in RI zoning to determine what changes to the transportation system might occur within a reasonable "worst-case" scenario. The Traffic Study states the following on pages 3-4:

An identical zone change application was submitted for these properties by Sage Engineering Associates in 2017. Following discussions with County and ODOT staff this analysis was required to assume that the property would be subdivided into 20 separate parcels each of which would contain a 7,500 square foot building (the maximum allowable building size in the zone), with uses ranging from veterinary clinics (one of 20 buildings), nine separate Building Materials stores, and ten General Light Industrial buildings. While this may reflect a “worst case scenario” this is not a reasonable development scenario and does not match the scale or intensity of Rural Industrial uses anywhere in Deschutes County. In addition, the County’s land use assumptions would not consider this intense of uses within long-range planning projects as evidenced by the employment assumptions within the ODOT-managed Travel Demand Modeling. Accordingly, these assumptions were revisited to provide a comparative land use scenario more reflective of anticipated development patterns.

Table 2 of the Traffic Study (page 5) sets forth Proposed Rural Industrial Zoning Trip Generation Potential, ITE Trip Generation 10th Edition, under a different worst-case scenario than analyzed for previous rezone applications for the subject property. The Traffic Study states that the scenario retains a building limit of 7,500 square feet and that it was assumed that unique uses (veterinarian or building material office) would be unique occurrences (similar to only assuming a single rural fire department under the existing zoning). “The resultant reasonable ‘worst-case’ scenario... is reflective of an overall Floor to Area Ratio (FAR) on the developable lands of 10% or 63,160 square-feet of enclosed building space.” This was based on the following:

- *The RV Storage Facility east of US 97 is a 9.05 acre lot with an 8,000 square-foot building (0.02 FAR)*
- *Jack Robinson’s overall site with three tax lots contains 26,500 square-feet of buildings on 22.6 acres (0.027 FAR)*
- *Willamette Graystone includes 4.33 acres with 19,090 square-feet of buildings (0.10 FAR)*

Each of these sites shows that rural industrial uses are generally land intensive areas for parking with limited building area. Based on this information, it was conservatively assumed that the entire site would develop with a 0.10 FAR. The allowable uses were also sized based on average building areas within the ITE manual to ensure that the scale of the uses is appropriate.” The Traffic Study states on page 5 that, “The prior application that was submitted to the County indicated that there would be up to 411 weekday p.m. peak hour trips [with development of the subject property]. This is six times a more reasonable assessment as shown in Table 2 would indicate from this zoning.

Table 2 of the Traffic Study shows a total of 68 potential weekday p.m. peak hour trips; 438 total daily trips. This includes an analysis of two Specialty Trade Contractor sites, Building Materials and Lumber Store, Animal Hospital/Veterinary Clinic, multiple Warehousing uses and multiple Manufacturing uses, totaling 63,160 SF for all potential uses. Table 3 (page 6) of the Traffic Study shows an increase of 65 weekday p.m. peak hour trips between existing zoning and potential proposed zoning trips.

The Traffic Study analyzed all site access points to the public roadway system via either a driveway or private roadway, nearest intersection collector or arterial roads to the development that would experience an increase of 25 additional peak hour trips and any other collector or arterial intersection requested by staff. Five (5) study intersections were analyzed. The Traffic Study stated on page 6:

Due to the current COVID-19 shut-down conditions, new data collection efforts are not possible at this time, The typical travel patterns have shifted during the shutdown as trips are generally for essential goods and services rather than school, tourism, recreation, and employment trips. Accordingly, the analysis will rely on historical counts from the prior land use application submitted in 2016 with appropriate growth factors and adjustments using ODOT ATR data. Forecasts

consider the future year 2040 conditions for consistency with the Bend Metropolitan Transportation Plan that extends between Bend and Redmond and includes the subject area.

Table 4 on page 8 of the Traffic Study sets forth Study Area Intersection Operations Standards for the five (5) intersections, which are all LOS "D" or better and notes that ODOT manages connections to the US 97 corridor and requires a volume to capacity ratio (v/c ratio) of 0.85 or less for ramp terminal intersections. All intersections are currently operating acceptably, but the Traffic Study notes on page 10 that "combined with the traffic volumes shows a much higher volume of traffic on the surrounding roads than is expected based on the land use patterns." It notes:

To address the regional traffic demands at the Deschutes Junction, Deschutes County is planning to reconstruct the Tumalo Place/Tumalo Road intersection as a single-lane roundabout at an estimated cost of approximately \$2.6M over the 2020/2021 fiscal years. All future 2040 analysis scenarios assume that this roundabout is in place. Other than area safety projects along the US 97 corridor there were no other public projects identified that would change any of the study intersection traffic control or patterns.

Table 6 sets forth Future 2040 Traffic Conditions, Weekday PM Peak Hour, Existing Zoning Scenario. Page 13 states that, with the proposed rezone, the traffic volume forecasts shown in Table 6 were increased by the trip generation differential shown in Figure 3. This reflects the year 2040 "with rezone" conditions that were used to assess whether the proposed plan and land use amendment creates a significant impact on the transportation system. Figure 7 illustrates the resultant traffic volumes (page 14) and Table 7 provides the operations analysis (page 15). The Traffic Report states on page 15:

Table 7 shows that the rezone does not cause any intersections to fail, but does create an incremental degradation in the performance of surrounding intersections that are already forecast to exceed County operational standards. Accordingly, the rezone results in a significant impact to transportation facilities.

The Traffic Study details mitigation measures on pages 15-21. These are summarized on pages 19-21:

Review of the traffic forecasts and conditions shows that the three "corners" of the Deschutes Junction are projected to exceed Deschutes County operational standards in 2040 with or without the proposed rezone due to the high regional travel between Redmond and northeast Bend. Of these three locations, the priority for improvements is: (1) the Tumalo Road/Tumalo Place intersection (already identified in County plans and allocated funding); (2) the Graystone Lane/Pleasant Ridge Road intersection; then (3) the Graystone Lane/Tumalo Road intersection. As the adopted Deschutes County Transportation System plan only considers future conditions through 2030 (before these remaining two intersections will fail) there are no identified improvements at either of these remaining intersections as these occur beyond this timeframe.

Improvements at any one of the three "corners" is expected to support the operations of the Deschutes Junction as an interconnected system, and the impact of the proposed rezone does not change any of the findings or needs within this area. However, the rezone does create a localized and incremental degradation to a system that is already forecast to exceed County performance standards.

While this analysis shows that the rezone has the potential to increase the trip generation compared to the existing EFU zoning, a rezone application is not a development application and in itself will not generate any additional impacts on the transportation system. Impacts will only occur with future development or land use changes that are implemented over time, and with the scale of impacts demonstrated within this analysis (up to 2%) these are unlikely to change the need and timing of

improvements to the Deschutes Junction Interchange. In fact, actual impacts could be lower than those shown.

Accordingly, equitable mitigation could take the form of a supplemental transportation System Development Charge that would also equate to the impact subtracting any value from Mr. Aceti's support of the County's planned transportation improvement. As Table 3 shows, the rezone could generate 65 additional p.m. peak hour trips, or an additional \$880 per trip assuming the full value of impacts using the "worst-case" scenario.

[An] approach of making lands available to the County to support the long-term needs based on fair market value, interim payments from Mr. Aceti based on actual "pro-rata" impacts on a per weekday p.m. peak hour trip basis, and the long-term plan updates would mitigate the finding of a significant impact. On an interim basis (prior to the TSP update and funding mechanism) the County would need to make the written finding that the system benefits outweigh the impact of the rezone:

- (A) *The provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvement would not result in consistency for all performance standards;*
- (B) *The providers of facilities being improved at other locations provide written statements of approval; and*
- (C) *The local jurisdictions where facilities are being improved provide written statements of approval.*

This approach would recognize that the three "corners" of the Deschutes Junction will not operate acceptably through 2040 but the contributions and availability of right-of-way in support of the needed improvements would be adequate to mitigate the specific impacts of the Aceti rezone.

In a September 1, 2020 submittal, Mr. Bessman submitted additional transportation and traffic analysis concerning the proposal in response to ODOT comments on the Traffic Study ("Traffic Study Response"). Mr. Bessman's cover email states:

Enclosed are my responses to the comments Dave and Don sent over to clarify some of the technical information in the report, please include this in the record. Short story is that growth was projected at 2.58% annually (from the 2016 counts to 2040 conditions), this was based on ODOT's Future Volume Tables per ODOT TransGIS. ODOT recently completed a detailed corridor plan for US 97 (which is not part of Tony's study area) that reviews safety needs and historical crash trends along the highway and at the junctions. Let me know if you need anything else from me in advance of tonight's hearing, hopefully this addresses the primary questions that were raised.

The 3-page Traffic Study Response addresses the four (4) comments submitted by ODOT set forth in the Public Agency Comment findings above.

With respect to the question regarding what the appropriate growth factors are and which ATR was utilized, the Traffic Study Response states, in relevant part:

ODOT has permanent traffic count (Automatic Traffic Recorder, or ATR) stations at the south end of Redmond (ATR 09-020) and along the Bend Parkway south of Empire Avenue. The station south of Redmond would be considered the most reflective of through highway growth on US 97, but there were no study intersections on the State Highway system as detailed within the scoping materials.

Trends from this ATR location show that through highway growth on US 97 has increased an average of 3.5% annually from the peak-recession conditions in 2010. It is unlikely that this growth will be sustained long-term, and with the COVID conditions traffic on the highway were reduced 25 percent in March, returning to 95% volumes by mid-August.

While the ATR's provide a means of looking backward at historical trends, ODOT's Future Volume Tables provide forecast date. This information is available on ODOT's TransGIS site, and projects a current volume (2018) at the Deschutes Junction of 27,700 Average Annual Daily Trips (AADT) and a 2040 forecast of 48,500 trips. This translates to 2.58 percent annual growth on the highway, which was the growth rate the traffic study applied throughout the County intersections that were analyzed.

With respect to the question regarding generated volumes and whether they are based on 2016 collected volumes grown with the appropriate growth factor, the Traffic Study Response confirms that 2016 traffic counts were adjusted based on the 2.58% growth rate.

With respect to the comment regarding adding a statement as to the ADT and peak hour traffic along US 97 and capacity, the Traffic Study Response states:

Movements onto US 97 at the Deschutes Junction are provided via merge and diverge ramps rather than a stop-controlled intersection (less sensitive to gaps), and as indicated in ODOT's comments the ability to easily merge will become more difficult with increased volumes on US 97 and Deschutes Market Road. Deschutes County is currently obtaining portions of the Aceti property to construct a new roundabout at the Tumalo Road/Tumalo Place intersection to address this volume increase on the County system.

ODOT recently completed a phased corridor plan for US 97 between Bend and Redmond. The workshops that ODOT held relayed that changes to US 97 between Bend and Redmond will start with roadside safety improvements (clear zone enhancements, rumble strips, etc.) and ultimately lead to a median along US 97 between Bend and Redmond with local trips served with frontage roads. Copies of the final study were not found online to determine whether the merge/diverge distances at the Deschutes Junction were reviewed, but with the recent increase in the posted speed to 65 miles per hour there were no commensurate changes made to these ramps and there is a substantial amount of heavy vehicles accessing the highway. With the sharp curve radii vehicles are essentially accelerating from 10 miles per hour to 65 miles per hour in 520 feet, which is less than the standard Entrance Ramp Details provided in Figure 9-11 within the ODOT Highway Design Manual of 1,220 feet.

These issues are not impacts associated with the Aceti rezone but reflect regional travel patterns and known congestion that ODOT is working to resolve through the INFRA plans within Bend's northern area.

With respect to the comment regarding safety evaluation, the Traffic Study Response states:

The purpose of a Transportation Planning Rule analysis is to identify whether or not a project creates a significant impact by changing the functional classification of an existing or planned facility, change standards implementing a functional classification system, or degradation to the performance of existing or planned facilities. The TPR analysis is based on future year 2040 conditions, and there are no specific development plans proposed at this time that would be entitled through this application. Accordingly, review of historical crashes prior to 2018 provide [sic] limited value to this long-range planning assessment.

While the safety evaluation can be informative for existing issues and priorities, ODOT recently completed a corridor evaluation that was focused primarily on safety improvements throughout this corridor. The Deschutes Junction is not included within ODOT's 2014 to 2018 Safety Priority Index System, and the contribution of the Aceti property for the overcrossing and provision of right-of-way for the planned roundabout has supported County and ODOT plans to improve traffic flow at this interchange. With any future site plan application additional review of safety will be necessary per Deschutes County requirements.

ODOT did not provide further comment or response to the Traffic Study Response during the open record period following the public hearing. No other person commented on the adequacy of the Traffic Study and/or the Traffic Study Response. No evidence was introduced to refute the conclusions in the Traffic Study and Traffic Study Response. The Applicant's Burden of Proof at page 17 states:

After careful study, and in coordination with Deschutes County and ODOT staff, it was determined that the intensive, unique statewide and regional transportation system surrounding and bisecting the property is more than adequate to serve the property after it is rezoned.

The Hearings Officer finds that the Applicant has studied all facilities identified by the County as potentially impacted by the proposed change. The Hearings Officer finds that zone change will have no significant adverse effect on the identified function, capacity, and performance standards of the transportation facilities in the impact area, such that it is in compliance with OAR 660-012-0060. The proposed zone change will have a minimal impact on the area road network. Traffic generated by future development of the subject property with RI-zone uses in the reasonable "worst-case" scenario will not significantly affect a transportation facility (less than 2%) and therefore will comply with the TPR. It will not allow levels of development that will cause existing or planned area transportation facilities to exceed their functional classification.

Substantial evidence in the record shows that all of the existing or planned transportation facilities within the study area will operate better than the TSP's standard of Level of Service "D". All of the long term performance and safety problems in the study area will occur with or without the zone change, due to rapidly increasing population and high volumes of regional trips. The capacity analysis shows that the "worst case" scenario will not worsen the performance of an existing or planned transportation facility that is otherwise projected to perform below the minimum acceptable performance standard identified in the TSP or DCCP.

As discussed in the findings above on Appendix C, comments from the County Transportation Planner and County Road Department agree with the Traffic Study's assumptions, methodology and conclusions, but do not completely agree with the proposed mitigation. The Hearings Officer finds that substantial evidence supports a finding that identified transportation impacts of the proposed re-designation and rezone can be adequately mitigated. The County Transportation Planner suggests that, instead of the Traffic Study's proposed mitigation for the intersections of Tumalo Road/Graystone Lane and Graystone Lane/Pleasant Ridge Road via property donations or acquisitions for future roundabouts, the County will assess transportation system development charges (SDCs) and other non-infrastructure mitigations as development occurs on the site on that development:

The current SDC rate is \$4,488 per peak trip. The County changes its SDC every July 1, per Board Resolution 2013-059. The actual SDC is based on the rate current when building permits are pulled, not the SDC rate when the land use is approved. The SDCs will mitigate the transportation impacts of the subsequent rural industrial development. Additionally, at time of future development, further traffic analysis may be required, depending on whether a future proposed development triggers the traffic analysis thresholds of Deschutes County Code (DCC) 18.116.310(C)(3). The County may also consider non-infrastructure mitigations (as an example, for manufacturing uses, start/stop times for workers would occur outside of the 7-9 a.m. and 4-6 p.m. peak hours), which are allowed under the Transportation Planning Rule (TPR) at OAR 660-012-0060(11)

The Hearings Officer finds that these criteria will be met with imposition of a condition of approval requiring transportation facility mitigation as set forth above.

- (2) If a local government determines that there would be a significant effect, then the local government must ensure that allowed land uses are consistent with the identified function, capacity, and performance standards of the facility measured**

at the end of the planning period identified in the adopted TSP through one or a combination of the remedies listed in (a) through (e) below, unless the amendment meets the balancing test in subsection (2)(e) of this section or qualifies for partial mitigation in section (11) of this rule. A local government using subsection (2)(e), section (3), section (10) or section (11) to approve an amendment recognizes that additional motor vehicle traffic congestion may result and that other facility providers would not be expected to provide additional capacity for motor vehicles in response to this congestion.

- (a) *Adopting measures that demonstrate allowed land uses are consistent with the planned function, capacity, and performance standards of the transportation facility.*
- (b) *Amending the TSP or comprehensive plan to provide transportation facilities, improvements or services adequate to support the proposed land uses consistent with the requirements of this division; such amendments shall include a funding plan or mechanism consistent with section (4) or include an amendment to the transportation finance plan so that the facility, improvement, or service will be provided by the end of the planning period.*
- (c) *Amending the TSP to modify the planned function, capacity or performance standards of the transportation facility.*
- (d) *Providing other measures as a condition of development or through a development agreement or similar funding method, including, but not limited to, transportation system management measures or minor transportation improvements. Local governments shall, as part of the amendment, specify when measures or improvements provided pursuant to this subsection will be provided.*
- (e) *Providing improvements that would benefit modes other than the significantly affected mode, improvements to facilities other than the significantly affected facility, or improvements at other locations, if the provider of the significantly affected facility provides a written statement that the system-wide benefits are sufficient to balance the significant effect, even though the improvements would not result in consistency for all performance standards.*

FINDING: As set forth in the finding above, the Hearings Officer finds that, with imposition of a condition of approval requiring assessment of transportation system development charges (SDCs) and other non-infrastructure mitigations as development occurs on the site on future proposed development, there will not be a significant adverse effect on the identified function, capacity, and performance standards of the transportation facilities in the impact area.

- (3) *Notwithstanding sections (1) and (2) of this rule, a local government may approve an amendment that would significantly affect an existing transportation facility without assuring that the allowed land uses are consistent with the function, capacity and performance standards of the facility where:*
 - (a) *In the absence of the amendment, planned transportation facilities, improvements and services as set forth in section (4) of this rule would not be adequate to achieve consistency with the identified*

- function, capacity or performance standard for that facility by the end of the planning period identified in the adopted TSP;*
- (b) *Development resulting from the amendment will, at a minimum, mitigate the impacts of the amendment in a manner that avoids further degradation to the performance of the facility by the time of the development through one or a combination of transportation improvements or measures;*
 - (c) *The amendment does not involve property located in an interchange area as defined in paragraph (4)(d)(C); and*
 - (d) *For affected state highways, ODOT provides a written statement that the proposed funding and timing for the identified mitigation improvements or measures are, at a minimum, sufficient to avoid further degradation to the performance of the affected state highway. However, if a local government provides the appropriate ODOT regional office with written notice of a proposed amendment in a manner that provides ODOT reasonable opportunity to submit a written statement into the record of the local government proceeding, and ODOT does not provide a written statement, then the local government may proceed with applying subsections (a) through (c) of this section.*

FINDING: The Applicant has not requested an approval "Notwithstanding sections (1) and (2) of this rule." The Hearings Officer finds these criteria are inapplicable.

- (4) ***Determinations under sections (1)-(3) of this rule shall be coordinated with affected transportation facility and service providers and other affected local governments.***

FINDING: The Planning Division sent written notice of the Applicant's proposal to a number of public and private agencies, including the City of Bend Fire Department, the Deschutes County Road Department and ODOT. The customary notice provided adequate opportunity for coordination with affected transportation and service providers and local governments. As previously indicated, comments from the County Transportation Planner and County Road Department agree with the Traffic Study's assumptions, methodology and conclusions and proposed mitigation of potential impacts to transportation facilities as development occurs on the via County assessment of transportation system development charges (SDCs) and potential non-infrastructure mitigation measures on future development proposals.

For all the foregoing reasons, the Hearings Officer finds the application complies with these criteria.

Division 15. Statewide Planning Goals

Consistency with statewide planning goals is determined at the time a comprehensive plan amendment is considered. ORS 197.835(6). It cannot be deferred to a subsequent permit proceeding after the plan amendment is adopted. *Columbia Riverkeeper, supra*, citing *Willamette Oaks v. City of Eugene*, 232 Or App 29, 36, 200 P3d 445 (2009); *Root v. Klamath County*, 63 Or LUBA 230, 252 (2011).

Goal 1: Citizen Involvement

To develop a citizen involvement program that insures the opportunity for citizens to be involved in all phases of the planning process.

FINDING: The Planning Division provided notice of the proposed plan amendment and zone change to the public through individual mailed notices to nearby property owners, publication of notice in the Bend "Bulletin" newspaper, and posting of the subject property with a notice of proposed land use action sign. A public hearing was held before the Hearings Officer on the proposal on September 1, 2020, and a public hearing on the proposal will also be held by the Deschutes County Board of Commissioners, per DCC 22.28.030(C). The Hearings Officer finds the proposal is consistent with Goal 1.

Goal 2: Land Use Planning

To establish a land use planning process and policy framework as a basis for all decision and actions related to use of land and to assure an adequate factual base for such decisions and actions.

FINDING: Goals, policies and processes related to plan amendment and zone change applications are included in the DCCP and land use regulations in Titles 18 and 22 of the Deschutes County Code and have been applied to the review of these applications. The Hearings Officer finds the proposal is consistent with Goal 2.

Goal 3: Agricultural Lands

To preserve and maintain agricultural lands.

FINDING: The Applicant's submitted soil study demonstrates the subject property does not constitute "agricultural land" because it is comprised predominantly of Class VII and VIII soils that are not suitable for farm use. The County relied upon the Borine Study in determining that the prior applications for re-designation and rezoning of the subject property (file nos. 247-14-000456-ZC and 247-14-000457-PA) were consistent with Goal 3. LUBA affirmed the County's determinations on all four factors, finding them to be supported by substantial evidence in the record in *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016), LUBA No. 2016-012, Final Opinion and Order (Remanded August 10, 2016). LUBA's rulings on this issue are detailed above and are binding under the law of the case.

No adverse impacts to other agricultural lands resulting from the proposal have been identified. Therefore, I find the Applicant's proposal is consistent with Goal 3; no exception to Goal 3 is required.

Goal 4: Forest Lands

To conserve forest lands by maintaining the forest land base and to protect the state's forest economy by making possible economically efficient forest practices that assure the continuous growing and harvesting of forest tree species as the leading use on forest land consistent with sound management of soil, air, water, and fish and wildlife resources and to provide for recreational opportunities and agriculture.

FINDING: The Hearings Officer finds the subject property does not include any lands that are zoned for, or that support, forest uses. Therefore, the Hearings Officer finds the proposal does not implicate Goal 4. Goal 4 is inapplicable.

Goal 5: Natural Resources, Scenic and Historic Areas, and Open Spaces

To protect natural resources and conserve scenic and historic areas and open spaces.

FINDING: The record indicates there are no identified Goal 5 resources on the subject property (cultural, historic, wildlife or plant). There are no scenic or historic areas and no open spaces on the

property. There is no wetland, river, stream, creek or pond on the property, and no riparian zone. Therefore, the Hearings Officer finds the proposal does not implicate Goal 5. Goal 5 is inapplicable.

Goal 6: Air, Water and Land Resources Quality

To maintain and improve the quality of the air, water and land resources of the state.

FINDING: The Hearings Officer finds the Applicant's proposal to rezone the property from EFU-TRB to RI will not impact the quality of the air, water, and land resources of the County. Any future RI Zone development of the property will be subject to local, state, and federal regulations protecting these resources. The Hearings Officer finds that this fact does not constitute "deferring" or "postponing" a Goal 6 compliance analysis to review of a specific development application.

Similar to my analysis concerning Goal 14, it is appropriate to consider restrictions and protections in the County's acknowledged RI zone regulations in determining whether the proposed plan amendment and rezone are consistent with the statewide planning goals. In particular, DCC 18.100.030(J) prohibits approval of any use of property requiring contaminant discharge permits prior to a review of the contaminant discharge permits by state and/or federal agencies. Thus, any impact to air, water and land resources from a specific proposed use is not allowed under the zoning code, and may not legally be approved by the County, until state and/or federal agencies review the details of any such proposal and issue permits (typically including conditions) restricting and regulating air emissions, discharges to waterways and ground water and other potential environmental impacts of the use.

The regulatory scheme set forth in DCC Chapter 18.100, which is an acknowledged regulation, maintains the quality of air, water and land resources of the state. The Hearings Officer finds the proposal to re-designate and rezone the property is consistent with Goal 6.

Goal 7: Areas Subject to Natural Hazards

To protect people and property from natural hazards.

FINDING: There are no mapped flood or volcano hazards on the subject property. Additional hazards include wildfire, earthquake, and winter storm risks, which are identified in the County's DCCP. The subject property is not subject to unusual natural hazards nor is there any evidence in the record that the proposal would exacerbate the risk to people, property, infrastructure, the economy, and/or the environment from these hazards on-site or on surrounding lands. Therefore, the Hearings Officer finds the proposal does not implicate Goal 7. Goal 7 is inapplicable.

Goal 8: Recreational Needs

To satisfy the recreational needs of the citizens of the state and visitors and, here appropriate, to provide for the siting of necessary recreational facilities including destination resorts.

FINDING: The proposed plan amendment and zone change do not affect recreational needs, and no specific development of the property is proposed. Therefore, the Hearings Officer finds the proposal does not implicate Goal 8. Goal 8 is inapplicable.

Goal 9: Economic Development

To provide adequate opportunities throughout the state for a variety of economic activities vital to the health, welfare, and prosperity of Oregon's citizens.

FINDING: This goal is to provide adequate opportunities throughout the state for a variety of economic activities. The Applicant asserts that the proposed plan amendment and zone change is consistent with this goal because it will provide opportunities for economic development in the county in general, and in the Deschutes Junction area in particular, by allowing the currently undeveloped and unused property to be put to a more productive use. The Hearings Officer finds the proposal is consistent with Goal 9.

Goal 10: Housing

To provide for the housing needs of citizens of the state.

FINDING: The proposed plan amendment and zone change will not affect existing or needed housing. Therefore, the Hearings Officer finds the proposal does not implicate Goal 10. Goal 10 is inapplicable.

Goal 11: Public Facilities and Services

To plan and develop a timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development.

FINDING: This goal requires planning for public services, including public services in rural areas, and generally has been held to prohibit extension of urban services such as sewer and water to rural lands outside urban growth boundaries. The Applicant's proposal will not result in the extension of urban services to rural areas. As discussed in the findings above, public facilities and services necessary for development of the subject property in accordance with the RI Zone are available and will be adequate. The Hearings Officer notes that the following public agencies, among others, did not provide comment on the application: Central Electric Cooperative, Swalley Irrigation District, Avion Water Company, Pacific Power and Light, Redmond Airport, Watermaster – District 11.

COWL argues that, without knowing the particular use for which approval may be requested in the future, there is no way to know whether the Applicant has water available for industrial use. The Hearings Officer finds that COWL's argument would require me to ignore substantial evidence in the record regarding the availability of public services to serve the subject property. Moreover, when the County considers individual applications for specific use(s) in the future, such applications cannot be legally approved without a demonstration by the applicant that public facilities and services are available under DCC 18.100.060, which requires all uses in the rural industrial zone, other than residential, farm or forest, to comply with the requirements of DCC Chapter 18.124, site plan review. Other than those uses permitted outright in the RI zone, conditional use permit review pursuant to DCC Chapter 18.128 also is required.

The Hearings Officer finds the proposal is consistent with Goal 11.

Goal 12: Transportation

To provide and encourage a safe, convenient and economic transportation system.

FINDING: For the reasons set forth in the findings above concerning Appendix C and OAR 660-012-0060, the Hearings Officer finds the proposal is consistent with Goal 12.

Goal 13: Energy Conservation

To conserve energy.

FINDING: The Applicant's proposal, in and of itself, will have no effect on energy use or conservation since no specific development has been proposed in conjunction with the subject applications. In any case, the record shows that providing additional economic opportunities on the subject property may

decrease vehicle trips for persons working in the Deschutes Junction area, therefore conserving energy. The Hearings Officer finds the proposal is consistent with Goal 13.

Goal 14: Urbanization

To provide for orderly and efficient transition from rural to urban use, to accommodate urban population and urban employment inside urban growth boundaries, to ensure efficient use of land, and to provide for livable communities.

FINDING: The proposed plan amendment and zone change would allow for future development of the site with uses permitted in RI Zone. LUBA concluded that the uses listed in DCC 18.100.010 are not urban uses. There is no residential dwelling within 600 feet of the subject site; it is not in a platted subdivision; it is not in a residential zone. The Applicant notes that the subject property has only 15.11 acres that can be used for development due to easements and required setbacks.

For the reasons set forth above in the Ruling on Applicability of Goal 14 Exception, the Hearings Officer finds the proposal is not likely to result in the “urbanization” of the subject site by allowing potential future development of Rural Industrial zone uses. Due to the appropriate County rural industrial development standards in DCC Chapter 18.100, compliance with these regulations will result in appropriate and compatible low density and not an “urban level” density. An exception to Goal 14 is not required for the proposed plan amendment and zone change.

Goals 15 through 19

FINDING: The Hearings Officer finds that these goals, which address river, ocean, and estuarine resources, are not applicable because the subject property is not located in or adjacent to any such areas or resources.

Division 33, Agricultural Land

FINDING: The Applicant requests approval of a plan amendment and zone change for the subject property. The Hearings Officer has determined herein, as bound by the LUBA decision in *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 156 (2016), that the subject property does not constitute “agricultural land” requiring protection under Goal 3 and therefore no exception to that goal is required. The subject property is not needed for any farm use to occur on other lands in the area, as set forth in the findings above. The Hearings Officer finds that the proposal is not subject to the associated regulations set forth in OAR Chapter 660, Division 33.

TITLE 22. DESCHUTES COUNTY DEVELOPMENT PROCEDURES ORDINANCE

Chapter 22.20 Review of Land Use Action Applications

Section 22.20.015 Code Enforcement and Land Use

A. Except as described in (D) below, if any property is in violation of applicable land use regulations and/or conditions of approval of any previous land use decisions or building permits previously issued by the County, the County shall not:

- 1. Approve any application for land use development;**
- 2. Make any other land use decision, including land divisions and/or property line adjustments;**
- 3. Issue a building permit.**

FINDING: The terms "land use development" and "land use decision" are not defined in DCC Title 22. However, the term "land use action" is defined in DCC 22.04.020 as follows:

"Land use action" includes any consideration for approval of a quasi-judicial plan amendment or zone change, any consideration for approval of a land use permit, and any consideration of a request for a declaratory ruling (including resolution of any procedural questions raised in any of these actions).

The Hearings Officer finds that the proposal requests a "land use decision" as defined in DCC Title 22.

There is an active code enforcement case (File no. 247-19-000064-CE) that has determined there are businesses operating on the subject property in violation of the current EFU-TRB zoning. As per County policy, the code enforcement file is sealed until the case is closed by County code enforcement. Therefore, the record in File no. 247-19-000064-CE is not part of this record.

Staff stated at the public hearing that, if the proposed plan amendment and zone change are approved, the County recognizes such approvals as a step toward resolving the code enforcement case. The Hearings Officer finds that this provision does not prevent the County from approving the subject application, particularly when considered in conjunction with DCC 22.20.015(B)(2) and (D) below.

B. As part of the application process, the applicant shall certify:

1. ***That to the best of the applicant's knowledge, the property in question, including any prior development phases of the property, is currently in compliance with both the Deschutes County Code and any prior land use approvals for the development of the property; or***
2. ***That the application is for the purposes of bringing the property into compliance with the Deschutes County land use regulations and/or prior land use approvals.***

FINDING: The Hearings Officer understands that the application is, in part, for the purposes of bringing the property into compliance with the Deschutes County land use regulations and/or prior land use approvals. As a condition of approval, the Applicant shall submit a certification regarding the purpose of the application, consistent with DCC 22.20.015(B)(2) above.

C. A violation means the property has been determined to not be in compliance either through a prior decision by the County or other tribunal, or through the review process of the current application, or through an acknowledgement by the alleged violator in a signed voluntary compliance agreement ("VCA").

FINDING: The record in File no. 247-19-000064-CE is sealed. Therefore, this record does not contain details of the nature, type and extent of the code violation on the subject property, nor the County's method of determining a violation exists. The only evidence in the record is the statement in the Staff Report that there is an active code enforcement case and Staff's statement at the public hearing that approval of the proposal here would be a step toward remedy of the code enforcement case.

D. A permit or other approval, including building permit applications, may be authorized if:

1. ***It results in the property coming into full compliance with all applicable provisions of the federal, state, or local laws, and Deschutes County Code,***

including sequencing of permits or other approvals as part of a voluntary compliance agreement;

2. *It is necessary to protect the public health or safety;*
3. *It is for work related to and within a valid easement over, on, or under the affected property; or*
4. *It is for emergency repairs to make a structure habitable or a road or bridge to bear traffic.*

FINDING: The Staff Report states:

The proposed plan amendment and zone change will not result in the property coming into full compliance with all application provisions of federal, state, or local laws, and the Deschutes County Code. If the plan amendment and zone change are approved, additional land use applications will be required to review the proposed use for full compliance with applicable provisions. However, the proposal is recognized as a sequential step in achieving full compliance. A voluntary compliance agreement has not been secured. Based on this information, staff believes approval of the proposed plan amendment and zone change are permitted under this section if a voluntary compliance agreement is secured.

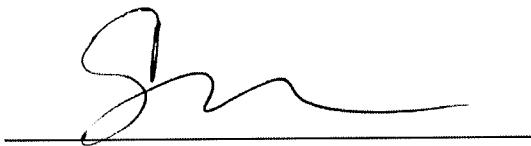
The Hearings Officer finds that approval of the proposed plan amendment and zone change are permitted under this section if a voluntary compliance agreement is secured. Such requirement is included as a condition of approval below.

IV. DECISION AND RECOMMENDATION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds the Applicant has met the burden of proof necessary to justify the request for a Comprehensive Plan Map Amendment to re-designate the subject property from Agriculture to Rural Industrial and a corresponding Zone Map Amendment (Zone Change) to reassign the zoning from Exclusive Farm Use Tumalo/Bend Subzone (EFU-TRB) to Rural Industrial Zone (R-I).

The Deschutes County Board of Commissioners is the final local review body for the applications before the County. DCC 18.136.030. The Hearings Officer recommends approval of the applications, subject to the following conditions of approval:

1. The Applicant shall submit to the Planning Division a metes-and-bounds description of the subject site to be re-designated and rezoned.
2. The Applicant shall submit a certification regarding the purpose of the application, consistent with DCC 22.20.015(B)(2).
3. The Applicant shall enter into a Voluntary Compliance Agreement ("VCA") with the Deschutes County Code Enforcement division of the Community Development Department to resolve alleged code violations in file no. 247-19-000064-CE.
4. As part of any development of the subject property, the developer shall be subject to assessment of transportation system development charges (SDCs) on that development at the current SDC rate then applicable. Additionally, further traffic analysis may be required, depending on whether a proposed development triggers the traffic analysis thresholds of DCC 18.116.310(C)(3). The County may also consider imposition of non-infrastructure mitigations under OAR 660-012-0060(11).



Stephanie Marshall, Deschutes County Hearings Officer

Dated this 7th day of October, 2020

Mailed this 8th day of October, 2020